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ANTI-TRUST LAWS AND UNFAIR COMPETITION.

July 20, 1935.

PRELIMINARY DRAFT

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C O N F I D E N T I A L

MEMORANDUM TO SECTION HEADS July 18, 1935

SUBJECT: WORK MATERIALS NO. 1

ANTI-TRUST LAWS AND UNFAIR COMPETITION

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L. C. Marshall
Director, Division of Review

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ANTI-TRUST LAWS AND UNFAIR COMPETITION

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I

INTRODUCTION

This study is an attempt to assemble under one cover the numerous methods of unfair competition and types of monopolistic restraints of trade condemned by the courts and the Federal Trade Commission as violative of the anti-trust laws. Before getting into a routine discussion of the cases a brief survey of the development of the law of unfair competition and the law governing monopolies may supply the background and scenery essential to the completion of the picture.

The law, as it touches upon the problems of competition and monopoly, has been progressively going through a process of evolution. From earliest times the law has exercised some control over trade and industry. Indeed, one could not find a better example of such control than the system which existed in England in medieval times. Regulations during that period were framed not only for workshops under the crafts and guilds but also for the market place, where detailed rules of the law merchant were made to insure fair trading.

It took a few centuries and an industrial revolution to arrive at a point in our economic history where it was felt that free competition was essential as a regulator of industrial life. But history teaches that economic freedom is a relative matter. With the rise of the factory system, many economic sins were committed in the name of the "free" or "natural" competition to which the early classical economists, such as Adam Smith, had given prominence in their writings. The evils of the early factory system are well known and the law began to cope with them at an early stage. Twenty-six years after the publication of Adam Smith's celebrated "WEALTH OF NATIONS", the first modern factory act was passed in England. The march of social legislation ushered in by this act has been practically uninterrupted to this day in countries of modern industrial civilization. The law however, did not stop with an act to correct the evils of laissez faire competition as it affected industrial workers, it went further and intervened to elevate the plane of competition in the marketing of goods.

Thus, the law began to distinguish between fair and unfair competition. Fair competition is constructive. It should be a rivalry for patronage in a market which permits survival only of the economically fit business units. Large and small, these business units have a right to engage in business and to survive solely by virtue of superior production or selling efficiency. The law assures no one an absolute right to compete or an absolute right to survive. Nor does the law permit an individual to make competition the death knell of fair trading.

The seed from which this philosophy grew may be found in the decisions of the courts under what is known as the common law of unfair competition. That body of legal doctrine evolved in the course of the nineteenth century and, springing from the old law of fraud, condemns doing business upon a fraudulent or deceptive basis. From this point of view, the whole law of unfair competition may be said to revolve around the countless ways in which one person may seek to interfere with the good will possessed by a competitor. Good will has been aptly defined by one writer as that which makes tomorrow's

business more than an accident.

One of the valuable symbols of good will which the courts protect is the trade mark or the trade name. By association it serves to distinguish A's goods from B's and gives tangible form to the reputation of the producer as one standing for quality and other desirable attributes. B is legally responsible when he falsely represents or "passes off" his goods as those of A. For example, he may use a trade mark or trade name so similar to A's as to confuse the purchasing public, thus depriving A of the business he would otherwise get.

In addition to this piracy of trade marks and trade names, there are many other practices whereby B may invade A's right to be protected against being deprived of his reasonable expectation of business. In addition to false representations B may also be guilty of intimidating or molesting A's customers. He may interfere with a competitor's contracts, disparage his goods, steal his trade secrets, bribe or entice away his employees and the like. This growth is reviewed by the United States Supreme Court in the Schechter case:

> "Unfair competition as known to the common law is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. Goodyear Manufacturing Co. v. Goodyear Rubber Co., 128 U. S. 598, 604; Howe Seale Co. v. Wycoff, Seamans & Benedict 198 U. S. 118,140; Hanover Milling Co. v. Metcalf, 240 U. S. 403, 413. In recent years its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own, - to misappropriation of what equitably belongs to a competitor. International News Service v. Associated Press, 248 U. S. 215, 241, 242. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law." (Schechter v. U.S., 55 S.Ct. 837-850, 1935)

It is at least partially true that the common law and its procedure is too rigid and, therefore, incapable of adapting itself to the rapidly changing conditions of modern economic life. Although a number of extensions of the doctrine of unfair competition were made by judicial decisions under the common law, the courts were unable to keep pace with the ingenuity of the business pirate, and, as a result, in 1914 we progressed to a new system of regulation of competition by an administrative tribunal, namely, the Federal Trade Commission.

This Commission is empowered to prevent the use of unfair methods of competition in interstate commerce. It may issue a complaint against the offending party whenever it has reason to believe that such a proceeding by it would be in the interest of the public. Thus, in some cases where the common law formerly afforded no relief, it was thought that the Commission would act as a guardian of public rights. However, the meaning of the expression "unfair methods of competition" in the Federal Trade Commission Act is still a highly controversial matter and the resulting uncertainty created the necessity for affirmative guide posts by which to chart the legal course, and to which industry must be guided if it is not to run afoul

of the law. The Commission failed to provide adequate criteria to guide business conduct.

Although the Commission has succeeded in attaining some of the objectives aimed at, in a large sense it has, through unfavorable court decisions and other factors beyond its control, failed to do what its sponsors expected. President Wilson, back in 1914 when the Commission was established under the new law, undoubtedly expected a new constructive force to develop and occupy as important a place in trade and industry as the Interstate Commerce Commission was occupying in the field of interstate transportation. This did not happen. Therefore, the latest stage in the effort to regulate competition came into being quite naturally and only after it was found that the mechanism provided for in the Federal Trade Commission Act was out of gear with modern industrial development. From a historical point of view this recent effort, represented by the NRA codes of fair competition, was a part of the continuing process of seeking correctives for destructive trade practices, thereby attempting to elevate competition to a higher level.

We are next concerned with the maintenance of competitive conditions against the encroachment of monopoly. This policy had its origin in the common law governing restraint of trade and conspiracies to monopolize. Originally, the courts confined the phrase "restraint of trade" to situations where, for example, A sold his business to B and agreed not to compete with B in a given area and for a given time. While the courts at first were hostile to such contracts during the eighteenth and nineteenth centuries, they were gradually permitted in England then generally in the United States, providing they were reasonable when looked at from the standpoint of the parties to the contract as well as from that of the public interest. But in our own country the development of a system of national control over these restrictive agreements did not evolve due to the inability of state courts to make their decisions effective beyond their own state boundaries. A striking example of this is the treatment accorded The Diamond Match Company, which had created a national business by purchasing small companies which agreed not to engage in the business for 99 years in all of the forty-eight states except two; in 1887 the courts of New York held one of these agreements to be a reasonable trade restraint, yet in 1889 the Michigan courts held another of the agreements to be illegal.

However, by the middle of the nineteenth century the term "restraint of trade" had begun to be applied to combinations or agreements among competitors for the purpose of securing control of the market and suppressing competition. These combinations or agreements assumed various forms such as to fix prices, restrict output, and divide territory and profits. In the United States the courts under the common law have generally held such arrangements illegal regardless of the economic or social justifications involved.

But just as in the case of unfair competition so in the field of monopoly, the common law was supplemented by legislation. In this country the so-called trust movement of the 1870's and 1880's produced various schemes for concentration of control and monopolizing market. The united protests against the trusts and their predatory practices led to the enactment of the Sherman Anti-Trust Act of 1890. That act declared illegal every contract, combination or conspiracy in restraint of interstate trade or commerce. Under that law one of the most interesting developments has been the shift from the narrow interpretations by the courts whereby every contract or combination in restraint of trade was considered unlawful, to the famous "rule of reason" set forth in

the Standard Oil case of 1911, by which only contracts or combinations which unreasonably restrain trade are held in violation of the law.

Just as the highly controversial expression in the Federal Trade Commission Act "unfair methods of competition" created uncertainties harmful to industry, so also it is becoming increasingly apparent that the flexibility of such a standard of judgment as "reasonableness" inevitably leads to uncertainty, and this is exactly what occurred under the Sherman Act. The Supreme Court has pointed out the factors which operate to render a restraint unreasonable, but the result has in most instances failed to provide a standard to guide the conduct of business men and trade associations.

In a general sense it is true, then, that the changed aspects of business and industrial activity have been controlled and regulated by new mechanisms devised to fit the new circumstances. Slow as the development of the law has been on occasion, there has been a steady inevitable evolution in the processes used to regulate the relationships of those engaged in commerce and other business pursuits. However, as to the growth of application of Anti-trust laws to deal with present day conditions there has been a notable lag or decided drift away from the evolutionary process.

This lag is best demonstrated by the difference in the development of the law of trusts in our own country and under the English system and forcibly contracted by examining the decisions in two well known cases: that of United States v. Trenton Potteries Co. et al and of Attorney General of the Commonwealth of Australia v. The Adelaide Steamship Company, Ltd.

In the Trenton Potteries Case the Supreme Court in 1927 upheld the conviction of twenty individuals and twenty-three corporations under the Sherman Act for combining to fix and maintain uniform prices and for combining to restrain interstate commerce by limiting sales of pottery to a special group known to them as "legitimate jobbers". In refusing to follow as to price fixing the well known rule of reason as laid down in prior decisions the court said:

> " But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable".

We see the court then adhering to an outmoded and inconsistent view that the power to fix prices is an evil in itself regardless of the manner of its exercise, for in the same opinion appears the following pronouncement:

> " The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices".

But with the results obtained in the Trenton Potteries Case contrast the results reached in the Adelaide Case, decided by the Privy Council in England as early as 1913. Refusing to treat the public interest as a thing apart from certain members of the public the court there gave consideration to producers and distributors as well as to consumers, and found no detriment to the public in permitting forty defendant mining companies and shipping companies to agree

on resale prices for the shippers of coal in large productive areas in Australia. Criminal prosecutions under an Australian Anti-Trust Act were being reviewed. In upholding the High Court of Australia, which had reversed convictions by the trial court, Lord Parker said:

> "It was strongly urged by counsel for the Crown that all contracts in restraint of trade or commerce which are unenforceable at common law, and all combinations in restraint of trade or commerce which if embodied in a contract would be enforceable at common law, must be detrimental to the public within the meaning of the Act, and that those concerned in such contracts or combinations must be taken to have intended this detriment. Their Lordships cannot accept this proposition.....
>
> "It was also strongly urged that in the term 'detriment to the public' the public means the consuming public, and that the Legislature was not contemplating the interests of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of the consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interest of the consumers that any articles of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the laborers expended."

As brought out in other portions of the opinion of Lord Parker it is clear that the new statute on monopolies which was being construed, had in 1906 added something to the previous doctrines regarding monopolies obtained from the Crown. The criterion had come to be the interest of the public in a realistic manner that considered all members of the public to be involved so that only unreasonable and detrimental combinations would from thenceforth be condemned. But in our own country, in construing the Sherman Act, which contained language almost identical with the Australian Industries Preservation Act, the law had reached the deplorable stage where a combination of individuals to stabilize prices is wrong even if there is no harm ensuing to the public from such a practice. And as a corollary to this state of affairs we have the equally regretable situation that the courts have permitted mergers of large business units in the past to accomplish what individuals were not allowed to do by apparently bona fide efforts at cooperation for the common good.

To be sure, the attitude of the court in the Appalachian Coals Case in 1933 may well be a step in the right direction, without the modification of the anti-trust laws, to meet new conditions in the interest of producers, laborers and consumers.

In this case, the court viewed the economic conditions of an industry as an entity, and recognized that the "interests of the producers are interlinked". It permitted changes to be made which would mitigate the evils

in an industry and foster fair competitive opportunities. On this point the court said:

> "The fact that the correction of abuses may tend to stabilize a business or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them constitutes an unreasonable restraint". (288 U. S. 374)

Thus the Court permitted members of an industry to correct and to attempt to eliminate by cooperative efforts evils or abuses existing in the industry, but only where the group attempting to gain such a result must still meet effective competition in a fair market, does not seek to monopolize the market, and has not the potential power to do so. Advances in price or other results flowing from a cooperative agreement are not in and of themselves harmful so long as they are caused by the elimination of competitive evils and not from artificial factors such as direct price fixing.

But the case is only one small step forward and in the light of the following statements of the Supreme Court, it is submitted that the construction of the anti-trust laws to be obtained from the courts in the future will not take the place of Congressional action in modification of the anti-trust laws under its undoubted power to dictate policies free from interference:

> "Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership.....
>
> "We recognize, however, that the case has been tried in advance of the operation of defendants' plan, and that it has been necessary to test that plan with reference to purposes and anticipated consequences without the advantage of the demonstrations of experience."

Even if the Appalachian Coals Case is commendable because it allowed coal operators to organize a selling agency to protect themselves from cutthroat competitive conditions such as destructive price cutting, it is not a holding that goes to the essence of price stabilization for the public welfare, since the decision was moot in the sense that the operation of the plan was not approved. Moreover, the industry as a whole was not allowed to adopt beneficial price stabilization. On the contrary, one of the elements of the case emphasized by the court was the fact that although the Appalachian Coals Sales Agency was formed with the view of having other regions form similar agencies, its creation was not made dependent thereon and there was no showing of a purpose, understanding, or agreement that in the event such agencies were formed, there would be any agreement or understanding between them to divide market territories, limit production, or to fix the price of coal. Only certain producers in the Appalachian area were allowed to compete effectively in a free market to which other coal operators were eligible.

A quarter of a century of experiment under the Sherman Act demonstrated the inadequacy of that law to cope with new monopolistic devices. Consequently in 1914 supplementary legislation, namely, the Federal Trade Commission Act,

to which we have previously referred, and the Clayton Act were passed. The Clayton Act gave the Federal Trade Commission authority to prevent interlocking directorates of corporations and to prohibit practices such as unlawful price discriminations, so-called "tying contracts" and stock acquisitions where the effect would be to substantially lessen competition or to create a monopoly.

Despite all this legislation, business mergers - which the anti-trust laws were popularly supposed to have prevented, - flourished and, in fact, were encouraged by United States Supreme Court decisions. The number and size of the holding companies and consolidations springing up in the years immediately preceding the stock market crash in the fall of 1929 is still too fresh in the minds of everyone. But brief reversion to the earlier growth of consolidated business units demonstrates that the Anti-Trust laws have never consistently accomplished their purpose of preventing large business units from doing injury to the public interest. In 1898, only eight years after the enactment of the Sherman Act, there were eight large consolidations of corporations, including the formation of the American Linseed Company. In 1899 there were twenty-six such corporate consolidations including the Standard Oil Company of New Jersey. In 1900 there were five such consolidations, and in 1901 there were six, including the organization of the United States Steel Corporation.

The existing devices under inadequate state laws incapable of exerting a national control had led to the passage of the Sherman Act of 1890. State constitutional provisions against monopolies or combinations in restraint of trade had proved ineffective - as in constitutions of Arkansas, Georgia, Kentucky, Tennessee and Texas. State statutes were equally impotent - as under the statutes in Maine, Michigan and Texas in 1899 and in Iowa and Kentucky in 1890.

But the Anti-Trust laws have not adequately filled the gap caused by the inability of state laws to regulate national business. The effectiveness of the Interstate Commerce Act of 1887 in establishing reasonable railroad rates and in prohibiting discrimination are not duplicated by like successes under the Anti-Trust laws. With the possible exception of some outstanding achievements in enforcement prior to 1911 the prosecutions, injunctions, damage suits and confiscation of property under those laws have not been of great importance. Up to about 1930, less than 50 individuals were sent to prison, and apparently none have gone to prison in recent years; less than $2,000,000 in fines were collected in the first forty years of the anti-trust program of the government and during that time 40 cartons of cigarettes were confiscated and released on bond.

In 1895 in the E. C. Knight Case, control of the major sugar refineries of the country was allowed to be concentrated in the hands of a single corporation because manufacturing was not commerce in the eyes of the Supreme Court, regardless of the nation wide effect upon commerce in one of the prime necessities of life. The unsatisfactory helplessness of both state and federal governments to deal with business activities transcending state lines has never been properly corrected depsite the virtual overruling of the Knight case in subsequent decisions. The Trans-Missouri Freight Case of 1897 and the Addyston Pipe and Steel Co. Case in 1899 denouncing combinations to maintain railroad rates and combinations of pipe manufacturers to advance prices, did not serve to prevent merger and holding companies prior to the market crash of

.. and uncontrolled activities are still permitted to partially paralyze the national efforts at regulation of trade and industry.

If we keep well in mind the fact that an enforced "free" competition was the mechanism underlying the Anti-Trust laws and that this mechanism was ostensibly designed to keep the channels of commerce open while protecting the public interest at one and the same time, it will be perceived that a change in that mechanism is now required. "Free competition" as an economic policy came to be inadequate to protect the public interest; the cutthroat competition engendered under such a policy called for a new mechanism to pilot the industrial ship safely between the Scylla of anarchistic unrestrained competition on the one side and the Charybdis of tyrannical unfettered co-operation on the other.

The days of groping by industries in the darkness of uncertain legal beacon lights to guide them should become a thing of the past. The new industrial development is well worth continuint if progress is to be maintained. If we are to go forward instead of backward, the public must be tolerant of reasonable experimentation in a field where there are so many disputed questions of fact and rapidly changing forms of industrial organization. In the words of Mr. Justice Brandeis "If we would guide by the light of reason, we must let our minds be bold."

II

The Anti-Trust Laws

I. Interstate Commerce

The application of the Anti-Trust Laws, by definition, and of necessity, is confined to restraints of interstate commerce. The cases drawing the line between commerce which is interstate, and hence subject to regulation, and commerce which is intrastate, or transactions which do not constitute commerce, and hence not subject to regulation, may be placed within several categories.

(1) Amusement Cases

In Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922) the plaintiff brought an action for damages under the Sherman Act alleging that defendants conspired to destroy the Federal League and to monopolize the baseball business. The court held, however, that interstate commerce was not present. It pointed out that although the operations of the defendant League necessitated transportation of players and equipment among the several states, "The business is giving exhibitions of baseball, which are purely state affairs .. the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words ... That which in its consummation is not commerce does not become commerce among the states because the transportation that we have mentioned takes place".

Hart v. Keith Vaudeville Exchange, 262 U.S. 271 (1923), involved somewhat similar facts. Plaintiff sought an injunction and damages alleging a combination by the defendants to exclude actors, managers and personal representatives of actors from practically all the vaudeville theatres in the United States and Canada, which were controlled by defendants, unless they paid defendants' fees. The bill further alleged that defendants' business involved the making of contracts that required performers to travel among the states and necessitated the transportation of scenery and animals. The case in the Supreme Court turned upon the issue of jurisdiction in the lower court, and was remanded to be decided upon the merits. Subsequently, it was held upon the merits that no direct and substantial restraint of interstate commerce was involved. 12 F. (2d) 341 (C.C.A. 2nd, 1926), certiorari denied, 272 U. S. 703, (1926).

Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923) was an action for damages under Section 7 of the Sherman Act. The defendant distributors of motion picture films demurred to a complaint which alleged that the plaintiff, an exhibitor, had been procuring films from some of the distributors but had refused to buy from others, who thereupon induced the former distributor to cease dealing with him; that all the distributors conspired to prevent him from carrying on his business; and that they had since refused to furnish him with film service, and had cancelled contracts which he held. Upon the question whether the restraint related to interstate commerce, Mr. Justice Sutherland stated at page 309:

"The film contracts were between residents of different states and contemplated the leasing by one to the other of a commodity manufactured in one state ******
and to be transported to and used in another. The business of the distributors of which the arrangement with the exhibitors was an instance, was clearly interstate. It consisted of manufacturing the commodity in one state, finding customers for it in other states, making contracts of lease with them, and transporting the commodity leased from the state of manufacture into the states of the leasees ... Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributor, to be by that agency held until delivered to the leasee in the same state put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination . . .

"Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities, and any combination or conspiracy which unreasonably restrains such purchase, sale, lease or exchange is within the terms of the Anti-Trust Act . . ."

(2) Labor Cases

In Industrial Association of San Francisco v. United States, 268 U. S. 64 (1925), the United States brought a bill for an injunction to restrain an alleged conspiracy and to dissolve certain of the defendant associations. The litigation arose out of the following facts: Prior to 1921 the San Francisco building industry was dominated by the building trades unions, which enforced the closed shop and other restrictions offensive to contractors and real estate men. After a series of strikes, during which building operations in San Francisco practically ceased, the defendant associations were organized. One of the defendants, the Builders Exchange of San Francisco, with a membership of a great majority of building contractors and dealers in building materials, put into effect the socalled "American plan". The plan required an open shop policy, and was enforced by a permit system. The object was to confine sales of certain materials, such as cement, lime, brick, sand, etc., to builders who supported the plan. These materials were made available to builders only if they obtained a permit from the Builders Exchange. All the materials were produced in California with the exception of plaster, which was imported from other states but "brought to rest" and commingled with other goods before being subjected to the permit system. The Court held that with respect to the plaster there was no interference with interstate commerce, since the interstate movement in plaster had closed before the operation of the plan became effective. With respect to materials produced in California, the Court held that the interference with interstate commerce was indirect and remote, and referred to prior decisions of the Court refusing to enjoin strikes on the ground that the direct restraint applied only to manufacture and not to commerce. At page 82 Mr. Justice Sutherland said:

". . . If an executed agreement to strike, with the object and effect of closing down a mine or a factory, by preventing the employment of necessary workmen, the indirect result of which is that the sale and shipment of goods and products in interstate commerce is prevented or diminished, is not an unlawful restraint of such commerce, it cannot consistently be held otherwise in respect of an agreement and combination of employers or others to frustrate a strike and defeat the strikers by keeping essential domestic building materials out of their hands and the hands of their sympathizers, because the means employed, whether lawful or unlawful, produce a like indirect result. The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation, for building is as essentially local as mining, manufacturing or growing crops, and if, by a diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

In Coronado Coal Co. v. United Mine Workers of America 268 U.S. 295 (1925) plaintiff brought an action for damages caused by an alleged conspiracy of the defendants to prevent plaintiff's interstate trade in coal in violation of the Sherman Act. The evidence was clear that union miners had destroyed valuable mining properties of the plaintiff's in the midst of labor difficulties occasioned by the breach of a union contract and the determination to operate with nonunion labor. When the action first came to the Supreme Court the court found evidence showing that certain unions and their officers had engaged in the conspiracy and destruction of the property, "but not enough to show an intentional restraint of interstate trade and a violation of the Anti-Trust Act." Upon the second trial additional evidence was introduced by the plaintiffs, which the court in the present case found sufficient to supply the element of intention. The court concluded that the object of the defendant was to prevent the shipping of plaintiff's coal to other states, where it would compete with coal originating from union mines, and tend to destroy maintenance of wages for union labor in competing mines. At page 310 Chief Justice Taft declared:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

(3) Advertising Cases.

In Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920) the action was to recover treble damages under section 7 of the Sherman Act. Plaintiff alleged that the defendant refused to accept advertising matter offered by the plaintiff unless the plaintiff, and other advertising agencies, would agree to limit the amount of advertising given by the plaintiff and other agencies to the publishers of other publications, with the intent of

acquiring a monopoly of the publication of advertising matter in a restricted field. The court drew a distinction between the execution of contracts between plaintiff and defendant, and the actual distribution of defendant's publications throughout the country. At page 442 Justice Day said:

> " . . . In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.
>
> "This case is wholly unlike International Textbook Co. v. Pigg, 217 U.S. 91, 30 S. Ct. 481, wherein there was a continuous interstate traffic in textbooks and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of federal control, and to exempt it from the burden imposed by state legislation."

In Ramsey Co. v. Associated Bill Posters, 260 U. S. 501 (1923), competing billposters in the United States and Canada entered into a combination to monopolize the business in their respective localities. Membership was restricted in a single billposter in each city and members were forbidden to compete with each other. Funds were furnished to members for the purpose of buying out competitors; members were prohibited from accepting work from an advertiser who gave business to a non-member; a schedule of prices was fixed; members were forbidden to accept work from anyone except twelve licensed solicitors (agents for advertisers), who were prohibited from patronizing non-members in the localities represented by members; and manufacturers were prevented, by threats of withdrawal of patronage, from furnishing posters, except at prohibitive terms, to independent billposters or to advertisers doing business with independents. By these tactics the combination grew in power until it attained a virtual monopoly. This was a suit for treble damages under the Sherman Act by plaintiffs, solicitors whose licenses had been cancelled by the combination, with a resulting heavy loss of business. But the lower court held that the posting by the billposter was a purely local service merely incidental to interstate commerce. The Supreme Court, however, disagreed, saying at page 511:

> "We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the States and with Canada. As a direct result of the defendants' joint acts plaintiffs' interstate and foreign business has been greatly limited or destroyed. Hopkins v. United States is not applicable.

There . . . the . . . practices of the Association directly affected local business only."

(4) Distribution of Merchandise.

In Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52 (1927) local paper trade associations fixed and enforced uniform prices to be charged by members in intrastate sales. In making sales in other states, the salesmen of each member habitually quoted prices from the same lists which applied to local sales. The court held that it was unnecessary to show a definite agreement to fix prices in interstate trade in order to find a violation of the Sherman Act. A paragraph of the Commission's order prohibited the execution or performance of agreements fixing prices on mill shipments when the paper sold was shipped from outside of the state where the wholesaler was located. The court pointed out that such a transaction involved two contracts, the first for sale and delivery by the wholesaler and retailer in the same state, in which the price was fixed by the local association, and the second between the wholesaler and manufacturer in different states. The Commission's order implied that the sale by the wholesaler to the retailer in the same state was a part of interstate commerce where the seller performed his contract by procuring shipment from a mill in another state to the retailer. This finding the court approved, saying at page 61:

". . . The election of the seller to have the shipment made from a mill outside the State makes the transaction one in commerce among the States. And on these facts the sale by jobber to retailer is a part of that commerce."

In Local 167 etc. v. United States, 291 U. S. 293 (1934), the United States brought a suit to enjoin a conspiracy to restrain and monopolize interstate commerce in poultry in the New York City area. Practically all the poultry came from other States than New York to terminals in Manhattan and Jersey City. Poultry was shipped to receivers who were paid a commission by the shippers. The receivers sold to market men who acted as wholesalers and sold to the retailers, who supplied the ultimate consumers. The marketmen organized a so-called chamber of commerce, allocated retailers among themselves and raised prices by concerted efforts. The chamber of commerce and individual conspirators hired men to obstruct the business of non-conforming dealers; in order to force compliance they employed violence and attempted to prevent recalcitrant dealers, wholesalers and retailers from obtaining poultry. Members of the trucking union which transported the poultry refused to handle the business of recalcitrant market men and members of the slaughters' union, who were also in the conspiracy, refused to slaughter. Several of the conspirators appealed from a lower court's decision granting the injunction, on the ground that they did not intend to restrain, nor did they interfere with interstate commerce. The Circuit Court of Appeals refused to accept this contention, pointing out that interstate commerce did not end with delivery of the poultry to the receivers. Judge Swan remarked that the receivers "were merely a conduit through which flowed the daily stream of commerce from shippers to market men". Upon appeal to the Supreme Court the decision was affirmed. Justice Butler, speaking for the Court, refused to draw a line at which interstate commerce, and the jurisdiction of the Court to prevent a restraint upon that commerce, came to an end. At page 297 of 291 U. S. he declared:

"The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. Public Utilities Comm'n v. Landon, 249 U. S. 236, 245. Missouri v. Kansas Gas Co. 265 U. S. 298, 309, East Ohio Gas Co. v. Tax Comm'n, 283 U. S. 465, 470-471. But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce.

"And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act. Bedford Co. v. Stone Cutters Ass'n ubi supra. Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 438. In this case the evidence fully sustains the decree."

This decision was explained in Schechter Poultry Corporation v. United States, 55 S. Ct. 837, 850 (1935) by Mr. Justice Hughes, in these words:

"The intrastate acts of the conspirators were included in the injunction because that was found to be necessary for the protection of interstate commerce against the attempted and illegal restraint."

In the interstate commerce cases under the Anti-Trust Acts, the courts will refuse to act unless they find the existence of (1) commerce, (2) which is interstate, and (3) which is subjected to a direct restraint. The Courts are more likely to find that a transaction involving the movement of tangible goods is interstate commerce than one which involves primarily intangible elements. Ordinarily, the courts will decline to accept jurisdiction where the restraint takes place before interstate commerce has begun, or after it has come to an end. But in the labor cases, where ordinarily the strike or other disturbances takes place before the goods have commenced to move in interstate commerce, the Supreme Court has applied the criterion of intent. If it finds an intent to restrain commerce, the conspiracy or combination will be held unlawful. But, as Chief Justice Hughes stated in the Schechter case, supra, at page 850, "Where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions." However, the court has declared in the Local 167 decision that it will enjoin intrastate activities if that becomes necessary to make the prohibition of a restraint upon interstate commerce effective.

II. Trade Associations and Exchanges.

(1) Maintenance of Traditional Channels of Distribution.

In Eastern States Retail Lumber Dealers Association v. United States, 234 U. S. 600 (1914) the defendant association issued to its members, retail lumber dealers, blacklists containing the names of wholesalers who sold directly to consumers. These activities were enjoined as a conspiracy in violation of the Sherman Act, the Court saying at page 608-609, 611-612, 614:

> "True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own.
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> . . . . . .
>
> "But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, as in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.
>
> "The circulation of these reports not only tends to directly restrain the freedon of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievances against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations.
>
> "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But', as was said by Mr. Justice Lurton, speaking for the court in Granada Lumber Co. v. Mississippi, 217 U. S. 433, 54 L. ed. 826, 30 Sup. Ct. Rep. 535, 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.'"

(2) Exclusion from the market: Boycotts.

In Montague & Co. v. Lowry, 193 U. S. 38 (1904) an association of manufacturers and wholesale dealers in tile operated under rules whereby dealers agreed not to purchase from manufacturers who were not members of the

association, and not to sell tile to non-members for less than "list" prices which were 50% higher than prices to members; while the manufacturers agreed not to sell to non-members at any price. The Court held that the association was a combination in restraint of trade under the Sherman Act, and said at page 45:

> " The agreement, therefore, restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the associations, and it enhanced prices to the non-member as already stated."

In Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20 (1912) a license to manufacture enameled iron ware under certain patents was granted to 85% of the manufacturers in the industry, under agreements whereby prices were to be fixed by a committee, rebates of royalties were to be given to those who observed the agreement, sales were to be made only to jobbers within the combination, and the jobbers, 90% of which entered into the agreement, bound themselves to observe resale prices fixed by the manufacturers. The Court held that this arrangement exceeded privileges granted by the patent laws and was a combination in restraint of trade under the Sherman Act.

Ramsay Co. v. Associated Bill Posters, 260 U. S. 501 (1923) was a suit for treble damages under the Sherman Act. A great many bill posters in the United States and Canada entered into an arrangement to control the business. Only a single bill poster in each city was permitted to enter the combination, and members of the association agreed to suppress competition among themselves. The association assisted members in buying out competitors; it fixed the schedule of prices to which members were to adhere; the members of the association boycotted advertisers who dealt with non-members. Furthermore, the members agreed to accept business only from twelve licensed solicitors (agents for advertisers), who were forbidden to deal with non-members in the localities in which members did business; and manufacturers were pursuied, by threats of boycott, not to furnish posters to independent bill posters or to advertisers dealing with independents. The association in time became almost a monopoly. Plaintiffs were solicitors who had lost business when their licenses had for some reason been cancelled by the association. The Court declared at page 511:

> "The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding non-competitive prices. The allegations clearly show the result has been as designed, the the statute has been violated and plaintiffs' business has suffered."

In Binderup v. Pathe Exchange, Inc., supra, plaintiff alleged that defendant distributors sought to drive him out of business by refusing to supply him with films. At pages 311-312 the Court said:

> "*****It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it and that, in effect, as far as the exhibitor is concerned, is what the distributors in

combination are charged with doing and intending to do. It is doubtless true that each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. ***The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restrict, in that regard, the liberty of a trader to engage in business'. Loewe v. Lawlor, 208 U. S. 274, 293, and as a necessary corollary, to restrain interstate trade and commerce, in violation of the Anti-Trust Act."

At common law, a trade boycott was lawful if conducted for a "legitimate" purpose. The purpose of maintaining the traditional channels of trade distribution, as in the Retail Lumber case, or of destroying the business of others in order to secure it for the boycotters, as in the Binderup case, would probably be considered "legitimate" by most state courts at common law, or even under state anti-trust laws. But the Supreme Court has forcefully condemned the boycott, except perhaps in certain labor cases, as a violation of the Sherman Law.

(3) Price-Fixing.

Abundant precedent exists in the Supreme Court decisions concerning agreements to fix prices. The first such agreement which came before the court was construed in United States v. Trans-Missouri Freight Association, 166 U. S. 290 (1897). In that case a committee, selected from the members of the defendant association, fixed rates to be charged by the member railroad companies. The court held that the Sherman Act made illegal all agreements which eliminated price competition by the competitors, and not merely unreasonable restraints. It declared at p. 341:

" The agreement on its face recites that it is entered into 'for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local.' To that end the association is formed and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty, and although the parties have a right to withdraw from the agreement on giving thirty days' notice of a desire so to do, yet while in force and assuming it to be lived up to, there can be no doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act."

A later case with virtually identical facts and decision is United States v. Joint Traffic Association, 171 U. S. 505 (1898).

In Addyston Pipe & Steel Co. v. United States, 175 U. S. 211 (1899), an association of manufacturers of iron pipe and other products formed a marketing arrangement whereby most of the United States east of the Mississippi was divided up among the defendant members. Requests for bids for consumers to any member were sent to a committee of the association which fixed a price,

and the contract was then awarded to that member who offered to pay the largest bonus into the pool. Certain cities were reserved to particular members, and when a request for a bid came from any of these cities the association determined the price and the bonus to be paid by the bidder to whom the city was reserved. At public auctions members of the association entered bids higher than that of the prearranged bidder. The Court held that the combination was a conspiracy which violated the Sherman Act. There was, of course, not the slightest doubt that the association was able to fix prices.

In Swift & Co. v. United States, 196 U. S. 375 (1905) a dominant proportion of independent dealers in fresh meat throughout the United States combined not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stockyards, to fix prices at which they would sell, and to maintain them by restricting shipments of meat. The Court found a conspiracy in restraint of trade under the Sherman Act.

In Thomsen v. Cayser, 243 U. S. 66 (1917) foreign owners of steamship lines operating between New York and South Africa formed a combination to end rate competition between themselves. They adopted uniform rates from which they allowed a 10% rebate to those who shipped exclusively on the vessels of the combination. They also employed "fighting ships" in order to drive competitors out of the trade. In a suit for damages by a shipper who complained of the unreasonable rates, the Supreme Court held the combination an unlawful restraint of trade, and said at page 87:

> " That the combination was intended to prevent the competition of the lines which formed it is testified, and it can not be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of 'fighting ships' to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the 'fighting ships'".

In Board of Trade v. United States, 246 U. S. 231 (1918), the Supreme Court held that the Sherman Act was not violated by a rule of the Chicago Board of Trade which prohibited its members from purchasing during the period between the close of its "Call" session and the opening of the session on the next business day, any grain "to arrive" at a price other than the closing bid at the Call. Justice Brandeis pointed out that the rule helped to improve market conditions in several respects, and said at p. 240:

> "As it applies to only a small part of the grain shipped to Chicago, and to that only during a part of the business day, and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago."

In Federal Trade Commission v. Pacific States Paper Trade Association, 273 U. S. 52 (1927) local paper trade associations fixed and enforced uniform prices to be charged by members in intrastate sales. In making sales in other states, the salesmen of each member habitually quoted prices from

the same lists which applied to local sales. The Court held that it was unnecessary to show a definite agreement to fix prices in order to find a violation of the Sherman Act, and said at p. 62;

> " The fact that there is no established rule that the lists shall be followed in taking orders for interstate shipments or that the quoting of lower prices is an infraction for which complaint may be made is not controlling in favor of respondents. An understanding, express or tacit, that the agreed prices will be followed is enough to constitute a transgression of the law. No provision to compel adherence is necessary".

The issue of price fixing as a violation of the Sherman Act is most strikingly presented by two recent Supreme Court cases, Trenton Potteries Co. v. United States, 273 U. S. 392 (1927), and Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933). In the Trenton Potteries Case an agreement between companies manufacturing 82% of the pottery produced in the United States to fix and maintain uniform prices was held to violate the Sherman Act whether the prices in themselves were reasonable or unreasonable. The language of Mr. Justice Stone at pp. 396-398 is the most clear-cut and positive expression of the judicial attitude toward price fixing agreements;

> "That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the Standard Oil and Tobacco cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and exchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it can not be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.
>
> "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman

Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable - a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

In the Appalachian Case competing producers of bituminous coal in the so-called Appalachian territory formed a corporation to act as their exclusive selling agent, with authority to determine the prices at which the coal mined by the individual member corporations was to be sold. The producers controlled 73% of the commercial production in the immediate region where they mined, but only 12% of the total production east of the Mississippi River. The Court refused to enjoin the combination as a violation of the Sherman Act, on the ground that the restraint upon competition was, in the circumstances of the industry, reasonable. The Court emphasized that the question of the application of the statute must be determined by "a close and objective scrutiny of particular conditions." It then described the grave economic conditions with which the industry was beset, because of over-expansion and overcapitalization, diminishing consumption resulting from the use of substitute fuels, organized buying and detrimental marketing practices. The Court emphasized the fact that the coal produced by members of the combination was sold in competitive markets, and that a vast volume of other coal was actually and potentially available. In view of these conditions it found that the elimination of price competition between members of the corporation did not constitute a violation of the anti-trust laws, saying, significantly, at p. 373:

". . . . But the facts found do not establish, and the evidence fails to show, that any effect will be produced which in the circumstances of this industry will be detrimental to fair competition. . . " (Underscoring supplied).

The pronouncement of the Supreme Court in the Appalachian Case is not necessarily, or even reasonably, in conflict with its language in the Trenton-Potteries Case. The Court realized that in upholding the validity of an arrangement whereby price competition was eliminated through the instrumentality of an exclusive sales agent it was departing from a uniform precedent of the past. See Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227 (1909). The decision was principally motivated, of course, by the disorganized condition of the industry. Upon a close examination of the facts the Court decided that the partial elimination of competition exerted only a slight, and in the circumstances, a reasonable effect upon consumers. In even going thus far the Court cautiously instructed the District Court to retain jurisdiction of the cause, and gave it authority to "set aside the decree and take further proceedings if future developments justify that course in the appropriate enforcement of the Anti-Trust Act." It is undoubtedly possible to contend that the Appalachian Case involved an "agreement to fix prices" and that consequently the decision is in conflict with the positive language of the Trenton Potteries Case. But the agreement is one to fix prices only in the sense that the members of the combination eliminated price competition between themselves. The existence of other competition and sources of supply precluded any possibility of imposing upon consumers prices at a level which may be termed "artificial". The effect of the two

decisions, therefore, is a holding that an agreement to fix prices, where power exists to fix unreasonable prices, whether or not such power is exercised, is in violation of the Sherman Act.

(4) Price Fixing by Buyers.

The Sherman Act was originally aimed at, and has ordinarily been applied to prevent, restraints of trade accomplished through control of supply, so that those purchasing from the restraining group are injured. But the policy of the Anti-Trust laws requires that sellers have the benefit of competition among buyers, as well as that buyers have the benefit of competition among sellers. At an early period the Supreme Court recognized that certain combined activities of buyers resulted in restraint of trade. Thus in Swift & Co. v. United States, supra, in addition to the conspiracy among the meat packing companies, as sellers to raise prices, there was an agreement among the defendants not to bid against each other in the livestock markets of the different states, to bid up prices for a few days in order to induce cattlemen to send their stock to the stock yards, and thus to acquire the cattle upon arrival at a lower price. The decree of the court enjoined the activities directed against sellers as well as those directed against buyers.

Cf Nash v. United States, 229 U. S. 373 (1913).

In Live Poultry Dealers Protective Association v. United States, 4 F. (2d) 840 (1924) more than half the wholesale dealers in live poultry in the City of New York organized the corporate defendant. The members of the association appointed a committee of seven who daily negotiated with the receivers or commission men, and, in view of the prospective supply and demand, established a price for the day, which governed all purchases made by any member of the association. The defendant objected to the petition for an injunction on the ground that the agreement was not an unreasonable restraint of trade. To this Judge Hand said at p. 842:

> "As to the second point, it is somewhat surprising at this day to hear it suggested that a frank agreement to fix prices and prevent competition as regards them among one-half the buyers in a given market may be defended on the motion that the results are economically desirable. We should have supposed that, if one thing were definitely settled, it was that the Sherman Act forbade all agreements preventing competition in price among a group of buyers, otherwise competitive, if they are numerous enough to affect the market. . "

In order that a collective buying agreement constitute a violation of the Sherman Act, the effect upon the sellers' market must be both injurious and substantial. Thus in United States v. Piowaty & Sons, 251 F. 375 (1917) where members of the National Onion Association were charged with a conspiracy directed against sellers the court dismissed the charges chiefly on the ground that no showing had been made as to the degree to which the buying market was dominated by the defendants.

(5) Predatory and Destructive Tactics.

In Story Parchment Company v. Paterson Parchment Paper Co., 282 U. S. 555 (1931), the Supreme Court sustained an award of damages against three manufacturers of parchment paper which, in order to preserve their existing

monopoly, cut prices and thus drove out a competitor who had just entered the field. This case merely recognizes the illegality of predatory price cutting which serves to maintain an existing unlawful monopoly. Cf. Thomsen v. Cayser, supra.

(6) Price Discrimination and Customer Classification.

The difficulty with discrimination between customers by means of discounts arises from Section 2 of the Clayton Act, which forbids price discrimination which substantially injures competitors. Until recently it seemed clear that this section interposed no objection to customer classification by manufacturers. In Mennen Company v. Federal Trade Commission, 288 Fed. 744 (C. C. A. 2d, 1923), cert. den. 262 U. S. 759 (1923) an order by the Federal Trade Commission compelling a manufacturer to allow the same discount to cooperative buying agencies established by retailers as was allowed to wholesalers, was reversed. The decision of the Circuit Court of Appeals relies heavily upon the right of a manufacturer to select his own customers, and reasons therefrom that he may allow any discount to any customer which he finds desirable. Upon an examination of the committee report and debates in Congress at the time of the passage of the Clayton Act, the court concluded that Section 2 of the Clayton Act forbade only such price discrimination as tended to suppress competition between the seller and those who competed with him, and was not intended to make unlawful price discrimination which might hinder competition between one who purchased at the discriminatory price and those who were in competition with him. In National Biscuit Company v. Federal Trade Commission, 299 Fed. 733 (C. C. A. 2d, 1924), cert. den. 266 U. S. 613 (1924) an order of the Federal Trade Commission compelling the Biscuit Company to cease its practice of discriminating between chain stores and cooperative buying agencies of retail stores was likewise reversed. The National Biscuit Company employed a straight quantity discount; however, in calculating the discount it considered the chain store organization as a unit, but refused the combine the total purchases of the cooperative retail buying agency. The Circuit Court of Appeals declared that there was no discrimination, since the company granted a straight quantity discount, and the cooperative activities of the retailers were insufficient to alter the fact that the purchases were really made by individual retailers. The court also added, however, that if there was a discrimination, the Clayton Act was not applicable for the same reason that was found convincing in the Mennen Case.

The ground upon which these two cases rely has been very substantially shaken by a recent decision of the Supreme Court. In Van Camp & Sons Co. v. American Can Company, 278 U. S. 245 (1929) petitioner brought a suit to enjoin violations of Section 2 of the Clayton Act. Defendant company manufactured and sold tin cans on a straight quantity basis. It gave, however, a secret discount, of 20% below the announced standard prices, to a competitor of complainant. The charge was that this practice resulted in substantially lessening competition in the line of interstate commerce in which complainant and his competitor were engaged. The Court ruled that the words of Section 2 of the Clayton Act "in any line of commerce" make unlawful any discrimination which substantially lessens competition not only between the seller and his competitors but also between the buyer and his competitors.

The Van Camp Case thus enunciates a rule which seems diametrically opposed to the principle upon which the decisions in the Mennen and the National Biscuit Cases rest. The Supreme Court "distinguished" the Mennen case on the strange ground that the decision should not have relied upon the aid of

committee reports in determining the meaning of the Clayton Act because the statute was unambiguous. Thus, by denying certiorari the Supreme Court approved at least the result of the Mennan and National Biscuit Cases; and yet it is clear from the Van Camp Case that the Court refuses to adhere to reasoning upon which these cases are made to rest.

It does not necessarily follow that the Van Camp decision is inconsistent with the Court's denial of certiorari in the two Federal Trade Commission cases. But many commentators have seen such a conflict, and have concluded that the effect of the Van Camp decision is to call in question the legality of a sales policy based upon a functional classification. For instance, it has been said:

> "However, since the decision in the Van Camp case any given sales policy, except the quantity discount, which is expressly permitted irrespective of its effect on competition, is subject to judicial inquiry to determine whether or not it substantially lessens competition in the competitive field of the wholesalers, retailers, chain stores, department stores, mail order houses and the like. Neither the business man nor the lawyer can guess on which side of the scale any court will cast the weight of its decision. If producers are driven to the sanctuary of the quantity discount in order to escape this judicial control, then Section 2 of the Clayton Act is indeed a meddlesome bit of legislation operating in a manner never intended by Congress and to an end unsought by that body.
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> "A realistic point of view would recognize that some discrimination is inevitable in any sales policy, and, submitting the discrimination, would emphasize the inquiry as to the effect on competition."
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> McAlister, Sales Policies and Price Discrimination Under the Clayton Act (1932) 41 Yale L. J. 518, 534.

A sales policy based upon a quantity discount is clearly beyond the suspicion of illegality, since Section 2 of the Clayton Act expressly exempts discriminations based upon differences in quantity. But a different legal effect may attach to an agreement to employ a uniform discount. However, in United States v. Fur Dressers' and Fur Dyers' Ass'n., Inc., 5 F. (2d) 869 (S. D. N. Y. 1925) where the rules of the association prohibited the allowance of discounts, the court declared that the provision was not an unreasonable restraint of trade, in the following words:

> "The regulation that no member shall allow any customer any discounts refers only to unwarranted deductions from prices expressly agreed upon when the skins are received for dressing and dyeing, and, as is conceded by the government, arrived at in competition. This also is a reasonable requirement, to enable members to determine whether a customer pays his obligations without any unjust demands for deductions.
>
> "This provision does not prevent a member from making proper allowances, as, for instance, for damages to furs, or shortages in delivery, or other proper claims. The rules themselves provide that a copy of all credits and allowances made by members must be filed with the association. They also provide for the arbitration of disputed claims for credits and allowances, and that all claims must be made within five

days after delivery. As a matter of fact, claims amounting to $4,672,555.63 have been allowed by members between the years 1915 and 1923."
5F. (2d) at page 871.

The holding, however, is of doubtful value as a precedent, since the court went on to declare that the absence of interstate commerce made the Sherman Act inapplicable. Thus the validity of the uniform quantity discount is far from clear.

However, it is doubtful whether any court would conclude that Section 2 of the Clayton Act makes unlawful all discounts not based on a straight quantity classification. The courts will undoubtedly recognize that a certain degree of discrimination is involved in every discount plan. The functional classification discriminates against department stores, chain stores, mail order houses, cooperative buying pools, and other large buying agencies, and allows the independent retailer to compete effectively with his organized or more efficient brethren. The straight quantity discount, on the other hand, favors the large buying agencies, and discriminates against wholesalers and independent retailers to whom they sell. Clearly, therefore, the courts will be forced to admit that a discount plan based upon a functional classification is not an arbitrary or undesirable business practice. And various legal arguments present themselves by which the serious question raised by the Van Camp Case may be disposed of. Where a chain store or a mail order house protests at the discriminatory discount allowed in favor of a wholesaler, it is possible to argue that the chain store, being a retailer, is not in the same line of commerce as the wholesaler, and hence the Clayton Act is not applicable. In Baron v. Goodyear Tire & Rubber Co., 256 Fed. 571 (S. D. N. Y. 1919) an action for damages was based upon an alleged violation of Section 2 of the Clayton Act. Plaintiff, a dealer in automobile accessories, charged that defendant tire companies discriminated in their prices by selling tires at lower prices to manufacturers of automobiles than to the accessory dealers. The Court held that this practice did not substantially lessen competition "in the same line of commerce" and said at page 574:

> " * * * There is apparently no competition between the manufacturers of tires and the dealers, nor is it alleged that any exists. The differentiation in price would not, therefore, substantially lessen competition."

Furthermore, the words of the Clayton Act require that the lessening of competition be substantial. In the Van Camp Case it appeared that the cost of the tin cans represented 33-1/3% of the cost of the product which the packing companies manufactured. In the ordinary retail business a manufacturer's price discrimination lessens competition between wholesalers and other buyers only with respect to the particular article to which the discrimination in price applies; and such discrimination would not be unlawful under the Clayton Act unless it appeared that the chain store or other large buyer dealt so extensively in the article under consideration, and the discrimination was so large, that competition was in fact substantially lessened. Finally, the Van Camp Case differs from the Federal Trade Commission cases in that the discount allowed by the American Can Company was secret and its course of conduct was deceptive.

(7) Control of Supply -- Regulation of Labor Supply.

Comparatively few cases involving agreements to control production appear in the reports of decisions by the United States Supreme Court, probably because such conspiracies were so obviously illegal that, if they were formed, the agreement and execution of the conspiracy were usually effected in secret. The first Supreme Court case involving production control was Addyston Pipe & Steel Co. v. United States, supra, where, as has already been described, markets were divided up among the defendant members and certain cities were reserved to particular members; and the Court found little difficulty in concluding that these factors, in conjunction with the rest of the arrangement, constituted an illegal conspiracy in restraint of trade.

Closely associated with agreements to curtail or allocate production are the cases dealing with monopolies in the sense of conspiracies to obtain substantially complete control of the supply of a particular product. In United States v. Patten, 226 U. S. 525 (1913) it was held that a conspiracy to run a corner in cotton with the purpose of securing sole control of the available supply, in such fashion that the defendants would be enabled to enhance prices, was in violation of the Sherman Act. The Court said at p. 543:

> "This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.
>
> "Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent."

The Supreme Court has condemned activities resulting in restriction of production although no express agreement for that purpose was involved. In American Column & Lumber Co. v. United States, infra, and in United States v. American Linseed Oil Co., infra, which will be discussed in greater detail below, the Court held that "recommendations", advice and exhortations by the trade associations to its members directed toward restriction of output, which had, or probably had, the effect of inducing such restriction, amounted to an illegal conspiracy under the Sherman Act. The actions of members of the trade associations in those cases were said by the Court to be "concerted efforts" and hence unlawful.

A case in which the Court made an exception to its uniform rule condemning production control is National Association of Window Glass Manufacturers v. United States, 263 U. S. 403 (1923). The manufacturers of hand blown window glass entered into an arrangement whereby the available supply of highly trained labor, which was inadequate to meet the needs of all the manufacturers, was allocated to the members of the industry for a limited period of about four months in any one year. The Court pointed out that the hand blown industry had been almost forced out of existence by the newly developed machine industry, which produced window glass at half the cost of

the handmade, and set the prices at which all window glass was sold. The long hours in the handblown industry and other adverse conditions had driven away many laborers, until the remainder, which consisted of only 2500 men, was insufficient to enable the factories to run continuously during the working season. The arrangement to divide the labor force equally among the factories was an answer to these conditions. Mr. Justice Holmes, speaking for the court, said at pp. 412, 413:

> "The defendants contend with a good deal of force that it is absurd to speak of their arrangements as possibly having any effect upon commerce among the States, when manufacturers of this kind obviously are not able to do more than struggle to survive a little longer before they disappear * * * It is enough that we see no combination in unreasonable restraint of trade in the arrangements made to meet the short supply of men."

A case which it is difficult to classify as control of production, but which supplies an interesting contrast to the Window Glass Case, is Anderson v. Shipowners Association, 272 U. S. 359 (1926). The owners of substantially all the vessels under American registry engaged in interstate and foreign commerce on the Pacific Coast entered into a combination to control the employment of all seamen on their ships. The association which they formed conducted an employment office; every seaman desiring employment was compelled to register and await his turn, and could not secure work unless he presented a certificate issued by the association. When his turn came, he was assigned to a particular vessel, whether or not he wished to work on that vessel or for that voyage; and the officers of the vessel likewise had no choice in the matter. The association moreover fixed the wages which the seamen were to be paid. In an action brought by a seaman who was not registered with the association, the Supreme Court held that the combination was in violation of the Sherman Act, saying at Pages 354,365:

> "Taking the allegations of the bill at their face value, as we must do in the absence of countervailing facts or explanations, it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the association. * * * These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act."

The Window Glass case may safely be disregarded in view of its extremely unique facts. It did not appear in the Anderson case that the scheme for regulation of employment was an answer to, or excused by, economic conditions. The inference may be drawn from these two cases, therefore, that economic adversity is a feature which may determine the reasonableness and hence the legality of a restriction on production. But the Supreme Court will scrutinize carefully any such restraint, and will declare it unlawful if it injuriously affects other parties in the economic process.

(8) Price and Information Filing.

The views of the Supreme Court upon the legality of open price plans employed by trade associations have been crystallized in four well known

decisions. In American Column & Lumber Co. v. United States, 257 U. S. 377 (1921), the Court was asked to pass upon the legality of the activities pursued by an association of hardwood manufacturers. The members thereof, representing one-third of the hardwood output of the country, forwarded to the central office of the association elaborate statistical reports of stock on hand, production, shipments, prices and names of purchasers. The Secretary of the association mailed to each concern reports and summaries of the statistical matter containing the views of each member as to market conditions and production for the following few months, and expert analysis of the reports, together with suggestions as to future prices and production. Frequent meetings were attended by the members of the association at which market conditions and production were discussed. The majority of the court, speaking through Justice Clarke, said at page 411:

> "convinced, as we are, that the purpose and effect of the activities of the 'Open Competition Plan', here under discussion, were to restrict competition and thereby restrain interstate commerce in the manufacture and sale of hardwood lumber by concerted action in curtailing production and in increasing prices, we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the anti-trust act of 1890 (26 Stat. 209) and the decree of that court must be affirmed."

The decision in this case was not unanimous, dissenting opinions being delivered by Justices Holmes and Brandeis. The former contended that a combination to distribute knowledge, notwithstanding its tendency to equalize prices, was far from a combination in unreasonable restraint of trade. Justice Brandeis, with whom Justice McKenna concurred, emphasized that there was no coercion, monopoly, division of territory or uniform prices; that all information distributed under the plan was made public, and all reports and market letters were filed with the Department of Justice and with the Federal Trade Commission; that the large lumber dealers before the initiation of the plan were enabled to take advantage of the ignorance of the isolated producers; that editorial comment and free discussion were essential to rational competition and intelligent conduct of business; that the majority had misconstrued the evidence in concluding that there was any purpose to curtail production, or that such restriction was in fact realized; that "there is nothing in the Sherman Law to indicate that Congress intended to condemn cooperative action in the exchange of information, merely because prophesy resulting from comment on the data collected may lead, for a period, to high market prices ***. The illegality of a combination under the Sherman Law lies not in its effect upon the price level, but in the coercion thereby effected. * * * The evidence in this case, far from establishing an illegal restraint of trade, presents, in my opinion, an instance of commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions"; and that the court's condemnation of these activities was difficult to reconcile with its toleration under the Sherman Law of powerful industrial mergers and consolidations.

In United States v. American Linseed Oil Co., 262 U. S. 371 (1923) twelve manufacturers of linseed oil entered into an agreement, with provisions for a financial forfeiture in case of violation, for the maintenance of a bureau which gathered and distributed information among the members as to price lists. Members agreed to adhere to schedules of prices and terms which they furnished to the bureau and to give notices of departure therefrom.

They were required to report all variations of price; name the prospective buyer; point of shipment; exact price, terms and discounts; whether sales were made to jobber, dealer or consumer; and to report all orders received; all such information being treated as confidential and concealed from the buyers. The information thus collected was reported to the members through statistical surveys made by the bureau. Each member was required to furnish the bureau, upon request, information with regard to any buyer and might require the bureau to secure similar data from all members under specific conditions. The Bureau made industrious efforts to prevent sales at prices below the scheduled lists. Monthly meetings were held, at which "matters pertaining to the industry" were discussed. A unanimous Court decided that the scheme was an illegal combination under the Sherman Act, but the language of Justice McReynolds, who spoke for the Court, reveals that the consideration was the power which the combination was enabled to exercise over a competitive market:

> "With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions. Obviously they were not bona fide competitors; their claim in that regard is at war with common experience and hardly compatible with fair dealing.
>
> "We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. * * * Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties."

In the Maple Flooring Manufacturers Association v. United States 268 U.S. 563 (1925), the defendant association distributed among its members information as to the average cost of production, which was based upon reports of individual costs of raw material and of operation. It also compiled and distributed information concerning freight rates from basing points to various markets enabling members to quote delivered prices. Members reported information as to the quantity and type of flooring sold, dates of sales and price received, average freight rates, commissions, stock on hand and unfilled orders, monthly production and new orders; this information, which concerned only past transactions and did not include names of purchasers or current prices, was summarized by the association and reported back to the members, without revealing the identity of members in connection with specific information. The reports prepared by the association were given wide publication through trade journals, and were communicated to the Department of Commerce. Monthly meetings were held by the members of the association at which "problems of the industry" were discussed, with no evidence of discussion or agreement upon prices. The majority of the Court decided that in these activities no violation of the Sherman Act was involved. The Hardwood and Linseed Oil cases were distinguished on the ground that the facts in those cases revealed "concerted efforts" of the defendants to curtail production and raise prices. But this distinction is by no means convincing, particularly because the language of the Court approving the activities in the

present case is virtually identical in reasoning and point of view with the dissenting opinions in the Hardwood case:

> "Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and prices, can hardly be deemed a restraint of commerce or if so it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful. * * * General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information can not in itself be said to be restraint upon commerce in any legal sense. The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production. Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell. * * * Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information."

The fourth in a series of cases involving open prices filing which came before the Supreme Court was Cement Manufacturers Protective Association v. United States, 268 U. S. 588 (1925). In this case the Court approved the cooperation of cement manufacturers in gathering and exchanging information concerning production and prices in so called "specific job" contracts, general statistical information, and information as to transportation costs from various points of production. A specific job contract was a contract which obligated the manufacturer to deliver in the future to a contractor at a maximum price the cement required to complete a specified construction project, but allowing the purchaser the advantage of any declining market price, and not obligating him to take the cement if he failed to secure the bid or if for any other reason he did not desire delivery under the contract. The details of such contracts, including names of contractors and specified construction projects involved, were reported by the members of the association, which employed agents to visit jobs, and reported back to the members full information regarding the contracts and the use of the cement shipped under them. These activities were pursued in order to prevent contractors in a period of rising prices from obtaining more cement than they were entitled to by entering into contracts with several manufacturers for the same specific job, and this purpose was considered sufficient by the Court to excuse the reporting of detailed information, including names of buyers and sellers, and what amounted to espionage by the association. In addition to the

information supplied on specific job contracts, the members rendered monthly detailed reports concerning delinquent accounts of their customers, and reports of production, shipments and stock on hand, which the association compiled and distributed, thus informing each member of the available supply of cement and by whom it was held. Meetings were held at which minor subjects were discussed but such dangerous issues as current prices, production, or market conditions were carefully avoided. The association also distributed to its members freight books listing rates from basing points to all markets. The Court found that the freight rate book enabled the manufacturer to calculate a delivered price on the basis of his own mill price to points in neighboring territory, and to determine the freight differentiation which he must offset in his mill price in order to compete with other manufacturers in other territory. The Court refused to condemn the distribution of credit information on the ground that no evidence appeared of any unified conduct with respect to the persons to whom or conditions on which credit should be extended, and that the information merely informed the individual judgment of the manufacturers. The compilation and distribution of the general statistical information was approved on reasoning similar to that in the Maple Flooring case; the Court declared that the tendency to bring about uniformity in price, apart from any agreement or understanding for maintaining price, was insufficient to constitute a violation of the anti-trust law. The traditional theory that uniformity of price is evidence of price manipulation, was rebutted by the opinions of economists to the effect that uniformity of price was a sign of free and active competition, "in the case of a standardized product sold wholesale to fully informed professional buyers."

In attempting to arrive at an estimate of the Supreme Court's attitude toward open price filing, one must emphasize that the Maple Flooring and Cement Cases are far more significant than the two earlier decisions. Certain commentators have, in fact, concluded that the latter two cases effectually overruled the former. Without accepting this contention, it is nevertheless true that the distinctions advanced by the Supreme Court itself, and further discussed by commentators, are rather tenuous in nature. The Court pointed out in the Maple Flooring Case that the reports of sales and prices were solely concerned with "past and closed transactions", as contrasted with the facts in the Hardwood and Linseed Cases. Again, the statistics reported by the Maple Flooring Association did not identify buyers and sellers, as was true in the Hardwood Case. It is true that such identification was present in the Cement Case with regard to specific job contracts, but was excused in view of the Association's commendable purpose in preventing fraud by contractors. Furthermore, the data collected by the trade associations in the latter two cases was not treated as confidential, in contrast to the policy pursued by the Linseed combination. The distinction, however, is of questionable soundness, for the publicity afforded by the Hardwood Association was much wider than that which the Court found, by inference, in the Cement Case. There was, moreover, no evidence in either the Maple Flooring or the Cement Case of any obligation or understanding on the part of the members of the Association to be guided in their business policies by the information supplied through the Association. This distinction, however, is likewise not especially convincing, for the Court found such an understanding in the Hardwood Case although there was no uniformity of prices, and refused to draw the same inference in the Cement Case, where such uniformity existed. In the Linseed Case the Court was perhaps more justified in finding "concerted efforts" in the fact that the combination was composed of a small number of powerful concerns, and that their obedience was compelled by means of forfeitures and penalties. And it is

possible to isolate the Hardwood Case, when it is considered that the Court stressed the "comments" and "recommendations" with regard to production and prices by an official of the Association. In the Maple Flooring and Cement Cases the Court emphasized that at the periodical meetings by members of the Association there was no evidence that prices were discussed. And the Supreme Court has distinguished between reports of "past" sales and "current" or "future" transactions. Finally, the Court expressed disapproval of the industrious efforts of the Bureau in the Linseed Case to secure compliance with published prices.

It may be admitted that the attitude of the Supreme Court towards the reporting of trade statistics underwent a substantial change between the former two and the latter two decisions which we have discussed, and that the distinctions sought to be established between the cases are in large part tenuous and without substantial basis. But it is impossible not to conclude that a price filing scheme which is sought to be used as a device for the raising of prices will be considered by the Supreme Court as a violation of the Sherman Act.

(9) Cooperative Credit Activities.

The growth of modern business has created a need for the distribution of accurate credit information. Mercantile credit organizations, such as Dun and Bradstreet, afforded the first answer to this need. In the activities of these companies no problem of the anti-trust laws arises. That problem, however, appears when the credit information is distributed by trade associations. It seems well established that the mere distribution of credit information by a trade association, without evidence of concerted action or agreements to act on such information, does not offend the anti-trust laws. In Cement Manufacturers' Protective Association v. United States, 268 U. S. 588 (1925), the members of the association rendered monthly reports of all accounts of customers two months or more overdue, giving the name and address of the delinquent dealer, the amount of the overdue account in ledger balance, accounts in hands of attorneys for collection, etc. There were also reports showing the general total of delinquent accounts in comparison with those for the last twelve months, reports of payments of accounts placed in the hands of attorneys, and a form, seldom used, for answering inquiries as to whether a particular name had appeared in the monthly report. The court refused to hold that the activities of the association in this respect constituted a violation of the anti-trust laws. Justice Stone said at p. 599:

> "There were never any comments concerning names appearing on the list of delinquent debtors. The Government neither charged nor proved that there was any agreement with respect to the use of this information, or with respect to the persons to whom or conditions under which credit should be extended. The evidence falls short of establishing any understanding on the basis of which credit was to be extended to customers or that any cooperation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer." (Italics supplied)

The holding of the court in this respect is thus inconclusive. The majority of the court merely said that the distribution of credit information was a legal activity, and also that no agreement existed. Whether the presence of such an agreement would have rendered the activities of the association illegal the court did not say.

The holding of the court in the Cement decision was not without precedent for in that case Justice Stone pointed out that "in Swift & Co. v. United States, 196 U.S. 375, 395, this court approved a decree which provided that defendants should not be restrained 'from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers.'"

While it seems definitely established, therefore, that the mere dissemination of credit information involves no conflict with the Sherman law, it is not possible to say with the same degree of assurance that an agreement not to extend further credit to delinquent debtors is also lawful. The available precedent is slight. In United States v. Southern California Wholesale Grocers Association, 7 F (2d) 944, (S. D. Cal. 1925) the defendant association distributed among its members lists of names of retailers who had been reported as financially irresponsible or who had failed to pay their bills. The court upheld the validity of an agreement to refuse further credit to such debtors, saying at p. 948:

> "There was the understanding among the members in the association that such persons should be accepted as cash customers only. It is not shown that such classification so indicated, as the result of the name appearing upon such a list, was necessarily obligatory upon the wholesalers, but the prime purpose of the list was to furnish information to the members regarding the responsibility of patrons, so that loss might be saved on bad accounts. I do not believe that the issuance of these lists, nor the understanding connected therewith, established a violation of the Anti-Trust Law, any more than did the lists referred to in the decision in the case of the Cement Manufacturers' Protective Association v. U. S. hereinbefore referred to."

In United States v. Fur Dressers' and Fur Dyers' Association, 5 F. (2d) 869 (S. D. N. Y. 1925) the by-laws provided that no discounts should be allowe no deliveries were to be made to buyers named upon a list of overdue accounts, except for cash. Members were required to give a $500 bond for the faithful performance of the by-laws. The court emphasized the desirability of these rules in view of the former chaotic credit conditions in the industry, and sustained the validity of the association activities. However, the holding is of doubtful value as a precedent, since the court went on to say that the absence of interstate commerce made the Sherman Act inapplicable.

Although the invalidity of an agreement to withhold credit has yet to be established by a strong line of precedent, there is no doubt that an agreement to boycott or to refuse entirely to deal with a debtor is unlawful. In Dorchy v. Kansas, 272 U. S. 306 (1926) a labor union called a strike to compel a company to pay a disputed claim which was long overdue. Mr. Justice Brandeis said, at p. 311:

"The right to carry on business--be it called liberty or property--has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification. But a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. In the absence of a valid agreement to the contrary, each party to a disputed claim may insist that it be determined only by a court. Compare Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 143; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109. To enforce payment by a strike is clearly coercion. . . ."

In Brescia Construction Co. v. Stone Masons Contractors' Association, 195 App. Div. 647, 187 N.Y.S. 77 (1921) a labor boycott was held illegal under similar circumstances, and the court declared at p. 654 of 195 App. Div.:

"It seems to us clear that the provisions of the agreement between the defendants which obligated...the members of the defendant unions not to do any work 'for or under any contractor, builder, corporation or persons owing money to any member of the Stone Masons Contractors' Association, for work performed or materials furnished,' are illegal and against public policy. . . . And in case any debt is claimed to be due to any member of the Contractors' Association the agreement contemplates that the labor unions will assist in collecting by arbitrary and oppressive measures claims thus asserted. . . .In other words, instead of according alleged debtors the right to have their disputes determined by the legal tribunals established for that purpose, the defendant associations have constituted themselves the judges of the facts and the law and the agencies for enforcing their unauthorized decrees."

Two recent Supreme Court cases have done much to clarify the law relating to cooperative credit activities. In Paramount Famous Lasky Corporation v. United States, 282 U. S. 30 (1930) ten corporations which manufactured motion picture films and distributed them to exhibitors throughout the country, controlling 60% of the business, agreed to contract with distributors for future exhibition of films only by a standard form of contract which provided that disputes and claims under the contract be submitted to a board of arbitration whose award was to be accepted as conclusive. Upon failure of the exhibitor to submit to arbitration or to pay the award, the distributor with whom he had contracted, and all others having contracts with that exhibitor, were required to demand security from him on each of their contracts. Those to whom he failed to pay security were to suspend service under their contracts until he paid it or complied with the award, and after a contract had been suspended for ten days the distributor might cancel it. Mr. Justice McReynolds, speaking for the court, concluded that the agreement constituted an unreasonable restraint of trade within the Sherman Act, assuming, apparently, that the case was so clear as to make extended analysis or explanation unnecessary.

In United States v. First National Pictures, Inc., 282 U. S. 44 (1930) distributors of 98% of the motion picture films produced in the country combined in a uniform credit arrangement. Whenever a theatre changed hands, the distributors, through local Film Boards, inquired into the credit and business arrangements of the new proprietor, who was asked to assume film contracts existing between the former owner and any of the distributors. No contract for the delivery of pictures could be made by any of the distributors with a new proprietor who had not assumed such outstanding contracts unless he furnished security. The arrangement was adopted to prevent the evasion of film contracts by exhibitors who transferred their theatres. Holding that the uniform credit system was in violation of the Sherman Act, the court said at p. 54:

> "The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action for the purpose of coercing purchasers of theatres by excluding them from the opportunity to deal in a free and untrammelled market."

The effect of these two decisions is to condemn uniform credit or security arrangements which operate as boycotts. The conclusion suggested by the available precedent is somewhat as follows: The more distribution of credit information, with complete freedom of initiative on the part of cooperating members, is lawful. An agreement not to extend further credit to delinquent debtors is probably lawful, unless under the circumstances of the industry the refusal prevents the debtor from obtaining goods and involves an improper coercion. An agreement to refuse to deal with delinquent debtors or debtors who fail to provide security clearly involves a violation of the Sherman Law.

(10) Resale Price Maintenance

In a series of cases decided by the Supreme Court, the law with respect to resale price maintenance has become fairly well established. The leading early case on the subject was Dr. Miles Medical Co. v. Park & Sons Co. 220 U. S. 373 (1911). Petitioner, a manufacturer of medicines prepared by secret formulas, required every wholesaler and retailer through whom its products were distributed to sign agreements to sell at prices specified by the manufacturer. Defendant, a wholesaler dealing in drugs, secured a supply of petitioner's medicines through wholesalers at prices which violated the agreement exacted by petitioner, and sold the medicines at similar "cut prices". Petitioner sought to enjoin the defendant from inducing its distributors to violate their contracts and from selling its medicines at less than the established resale prices. The Supreme Court refused the injunction, on the ground that the policy pursued by the petitioner was in violation of the Sherman Act. Mr. Justice Hughes, speaking for the Court, said at pp. 408-409:

> "If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. * * *

"But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. * * *

" * * The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

The next case which came before the Court involving a resale price maintenance scheme was Bauer v. O'Donnell, 229 U.S.1 (1913). In this case the article the price of which the petitioner sought to fix, by means of a notice on the package was patented; but the Court declared that once the manufacturer had parted with title to a product manufactured under patents, the privilege conferred by the patent laws did not embrace the right to fix the price at which the product could be sold. In Boston Store v. American Graphone Co., 246 U.S.8, (1918) the Graphaphone Company manufactured a patented article, and required from distributors contracts to maintain resale prices. It brought a suit to enjoin violations of the contract by defendant, a distributor. Chief Justice White, speaking for the Court said at page 25:

"Applying the cases thus reviewed there can be no doubt that the alleged price-fixing contract disclosed in the certificate was contrary to the general law and void. There can be equally no doubt that the power to make it in derogation of the general law was not within the monopoly conferred by the patent law, and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred."

United States v. Colgate & Co., 250 U.S. 300 (1919) arose on an indictment for violation of the Sherman Act. The indictment, as construed by the District Court, did not allege that defendant had made contracts with its distributors, but that it had merely indicated the prices at which it wished its products to be sold, and refused to sell to those distributors who did not charge such prices until they gave assurances of compliance with defendant's policy. The Supreme Court distinguished the Dr. Miles case on the ground that here the manufacturer had made no contracts for price maintenance, and said at p. 307:

"In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. ** "

United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920) also involved an indictment under the Sherman Act, which alleged, however, the execution of actual contracts for price maintenance. The Court, through Justice McReynolds, explained that the Colgate Case was not intended to overrule the Dr. Miles Medicine Case, and said, at p. 99:

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them and one where he enters into agreements - whether express or implied from a course of dealing or other circumstances - with all customers throughout the different states, which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states."

Federal Trade Commission v. Beechnut Packing Co., 257 U.S. 441 (1922) was the first case to come before the Court in which resale price maintenance was alleged to be an unfair method of competition within the Federal Trade Commission Act. The Beechnut Company did not make formal contracts with its distributors. It announced, however, that it would refuse to sell to any dealer who failed to maintain prices indicated by the company. It urged dealers to report cases of violation, and instructed its salesmen to the same effect. The company maintained lists of "undesirable" dealers, who had been reported as selling below the indicated prices, and removed the names from the list only when the dealer gave "satisfactory assurances" that it would comply with the company's wishes. In order to enforce its policy the company employed a system of symbols or key numbers by which any package sold at cut prices could be traced back to the offender. The Court found that the activities pursued by the Beechnut Company amounted to a violation of the Sherman Act, since the elaborate methods were equivalent to "agreements express or implied". Mr. Justice Day, speaking for the Court, said at pp. 454-455:

"* * * The facts found show that the Beech-nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the Colgate Case was held to be within the legal right of the producer.

"The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trade, if they would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. ******"

"* * * Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements expressed or implied intended to accomplish the same purpose. * * * * "

The Court declared, however, that the order of the Commission forbidding any form of price maintenance was too broad. It directed that the company be

enjoined from its policy of price maintenance (1) by the practice of reporting the names of recalcitrant dealers; (2) by enrolling dealers on "undesirable" lists until assurances were given to maintain the designated price; (3) by employing salesmen to report such undesirable dealers; (4) by utilizing numbers and symbols in order to detect offenders (5) "by utilizing any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company". In United States v. General Electric Co., 272 U.S. 476 (1926) the Supreme Court refused to find a violation of the anti-trust act in the price maintenance scheme of the General Electric Company, which distributed its patented articles through 21,000 agents. The holding of the Court appears at page 488:

> "We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer. * * * *"

The doctrines enunciated by the Supreme Court with respect to resale price maintenance have suffered severe criticism. The distinction which the Court has drawn between illegal contracts and a course of dealing, which, it is asserted, in reality is equivalent to the execution of a contract, has been attacked as arbitrary and without factual foundation. And, it is charged, the result of the Beechnut Case is to permit a system of price maintenance but to forbid the use of modern business methods to make it effective. Henderson, The Federal Trade Commission (1924) 299. More important, it seems clear that the rules and distinctions established by the Court have no basis in economic realities and ignore the business purposes for which resale price maintenance is employed. A discussion of the economic reasons and justifications for price maintenance is, it is thought, unnecessary at this point, for the Supreme Court will in all probability adhere to its rules and continue to ignore business and economic considerations. Some of these considerations have been pointed out in dissenting opinions (see opinion of Justice Holmes in the Dr. Miles Medical Case, supra), but these objections have remained ineffectual. Subsequent to the Beechnut Case, the Court has refused to review the decisions of lower courts in several instances.
(See Butterick Co. v. Federal Trade Commission, 267 U.S. 602 (1925);
Hills Bros. v. Federal Trade Commission, 270 U.S. 662 (1926);
Harriett Hubbard Ayer, Inc. v. Federal Trade Commission, 273 U.S. 759, (1927).

The unlawful restraint upon trade, according to the view of the Court, consists in the agreements made between the manufacturer and distributors. When a number of manufacturers agree to employ a resale price maintenance scheme, a further and distinct agreement may be found between the manufacturers, which likewise appears to be an unlawful agreement within the Anti-Trust Laws.

(11) Tying Clauses, Full Line Forcing and Exclusive Dealing.

Prior to the passage of the Clayton Act, it was not clear that tying clauses were illegal under the Sherman Act. In Henry v. A. B. Dick Co., 224 U.S. 1 (1912), the Supreme Court held that the manufacturer of a patented

article could "license" the purchaser to use it on condition that he use with it only unpatented supplies made by the same manufacturer. In United States v. Winslow, 227 U. S. 202 (1913), the Court upheld as not in violation of the Sherman Act the tying contracts of the United Shoe Machinery Co. which bound lessees of patented machines to use with them certain unpatented machinery made by a lessor.

Section 3 of the Clayton Act made illegal all tying clauses which "substantially lessen competition". In Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502 (1917), the Court relied partly upon Section 3 of the Clayton Act, but in addition expressly overruled the Dick case, and declared that the tying clause there in question was illegal under the Sherman Act. In United Shoe Machinery Co. v. United States, 258 U. S. 451 (1922), the Supreme Court ruled that the same tying clauses considered in the Winslow case were in violation of the Clayton Act. The Court pointed out that the tying agreements, coupled with the "dominating position" of the company in the industry, effectually prevented the lessees from acquiring machinery manufactured by a competitor.

Accord:

Radio Corp. of America v. Lord, 28 F. (2d) 257 (C.C.A.3rd 1928) certioraridenied 278 U. S. 648 (1928).

Stanley Co. of America, Inc. v. American Telephone & Telegraph Co., Inc. 4 F. Supp. 80 (D. C. Del. 1933). (Tying contract in lease of motion picture producing apparatus.)

The Federal Trade Commission has also attempted to suppress the use of tying clauses. In Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463 (1923), the Commission order the Sinclair Company and other large distributors of gasoline to desist from the practice of leasing gasoline tanks and pumps to retail dealers at nominal rental, on condition that the equipment be used only with gasoline supplied by the lessor. The order was reversed, on the ground that there was no violation of the Clayton Act, because the lessee was free to use gasoline of competitors in other equipment, and that the practice was not an unfair method of competition within Section 5 of the Federal Trade Commission Act. The Court declared that there appeared no purpose or power to acquire an unlawful monopoly, and no evidence that the effect of the practice would unduly lessen competition.

The best known case upon the legality of full line forcing is Federal Trade Commission v. Gratz, 253 U. S. 421 (1920). Respondent sold steel ties for use in binding cotton bales only on condition that the purchaser would also buy the necessary jute bagging to be used with the ties. The Supreme Court reversed the Commission's order to desist on the ground that there was no element of deception or fraud, and that the complaint failed to show sufficient control by the respondent of the two lines of business to constitute a monopoly. In Federal Trade Commission v. Paramount Famous-Lasky Corp., Inc. 57 F. (2d) 152 (C.C.A. 2d, 1932), respondent was ordered to cease the practice of "block booking" by which an exhibitor of motion pictures was forced to take all the films in a "block" or none. The Circuit Court reversed on the ground that the respondent controlled only a small percentage of the total production, that his competitors were not injured, that the exhibitors were not coerced but merely presented with an alternative and that the practice did not constitute a tying agreement.

An exclusive dealing contract was held illegal in Standard Fashion Co. v. Magrane - Houston Co., 258 U. S. 346 (1922). There a manufacturer of dress patterns brought an action to restrain the violation by a retail dealer of a contract to deal exclusively in patterns produced by the plaintiff. The Supreme Court ruled that the contract was in violation of the Clayton Act. It emphasized that plaintiff controlled two-fifths of the production of patterns throughout the country, and hence that the effect of the contract not to handle a competitor's patterns was to "substantially lessen competition" within Section 3 of the Clayton Act. Cases prior to the passage of the Clayton Act are Whitwell v. Continental Tobacco Co., 125 F. 454 (C. C. A.8th, 1903) and Continental Wallpaper Co. v. Voight & Sons Co. 212 U. S. 227 (1909).

The Federal Trade Commission entered an order in another dress pattern case. The order, which was based upon Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act was affirmed. Butterick Co. v. Federal Trade Commission, 4 F. (2d) 910, (C.C.A.2d 1925). Certiorari denied, 267 U. S. 602 (1925). In B. F. Pearsall Butter Co. v. Federal Trade Commission, 292 F. 720 (C.C.A. 7th, 1923), an order based upon the Clayton Act was vacated, on the ground that respondent controlled only one per cent of the trade, that many of his competitors employed similar exclusive dealing contracts and that in return for the exclusive dealing agreement respondent granted an exclusive territory to the retailer. In Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568 (1922), the Court found that the exclusive dealing agreements there involved were contracts of agency, and not of sale, and hence it ruled that Section 3 of the Clayton Act did not apply; the Court also declared that the making of such contract was not unfair within Section 5 of the Federal Trade Commission Act.

(12) Enticing Employees.

In Albert Pick-Barth Co. Inc. v. Mitchell Woodbury Corp., 57 F. (2d) 296 (C.C.A.1st, 1932) an action was brought for damages under Section 7 of the Sherman Act as amended by Section 4 of the Clayton Act. The defendants had enticed the employees of the plaintiff to leave its employment and to join their own organization, bringing with them valuable information and customer lists, to the injury of the plaintiff. The court rules that these facts constituted a violation of the anti-trust laws and awarded damages.

Accord:

Cleaves v. Peterboro Basket Co. 54 F. (2d) 101, (N.D.H. 1931).

American Steel Co. v. American Steel and Wire Co., et al., 244 F. 300 (D.Mass. 1916)

(13) Uniform Cost Accounting

At the outset a distinction must be drawn between uniformity of methods of cost accounting and uniformity of elements of cost. With regard to cooperative action in the former category no problem of the Anti-Trust laws arises. As defined in one of the leading text writers upon the subject "uniform cost accounting comprises a set of principles and in some cases of accounting methods which when incorporated in the accounting systems of the individual members in an industry will result in the obtaining of cost figures by the individual members of the industry which will be on a comparable

basis."

Uniformity as to methods of accounting is primarily educational, while uniformity as to elements of costs is generally looked upon as a guise for price fixing. To understand the legal aspects of this practice, it must be emphasized that a plan which is educational, must not be used as an instrument to promote or affect an illegal agreement. If the plan comprises arbitrary and artificial cost elements, it will be illegal because of its price fixing character. Thus the individual must follow his own actual cost.

There are but a few cases bearing upon the legal limits of uniform cost accounting. In the Maple Flooring Case, supra, the Supreme Court refused to condemn the computation and distribution, among the members of the association, of information as to the average cost of their products. The Court carefully described the methods of calculating costs, and concluded that all practicable accuracy was attained. The association had more or less arbitrarily distributed the total cost of all the different grades of flooring produced from a certain amount of rough lumber among the several types thus produced. Of this Justice Stone said, at 268 U. S. 570:

> "There is no substantial claim made on the part of the Government that the preparation of these estimates of cost was not made with all practicable accuracy or that they were in any respect not what they purported to be, an estimate of the actual cost of commercial grades of finished flooring fairly ascertained from the actual experience of members of the Association, except that the point is made by the Government that the distribution of cost among the several types and grades of finished flooring produced from a given amount of rough lumber was necessarily arbitrary and that it might be or become a cover for price fixing. Suffice it to say that neither the Government nor the defendants seem to have found it necessary to prove upon what principle of cost accounting this distribution of cost was made and there are no data from which any inference can be drawn as to whether or not it conformed to accepted practices of cost accounting applied to the manufacture of a diversified product from a single type of raw material."

The Court in approving the dissemination of average costs, carefully pointed out that the plan should not be made an arbitrary basis for determining cost or price. In this respect it must be emphasized that in order to be legal the individual must exercise his own discretion as contrasted with an agreement or concerted action upon an arbitrary basis. The language of the Court at page 585 is significant; it said that the individual concerns must be "left free to base individual initiative on full information of the essential elements of their business".

The court recognized that the use of average costs may become illegal when coupled with an agreed margin of profit. In reference to this, the court said at page 572:

> "It cannot, we think, be questioned that data as to the average cost of flooring circulated among the members of the association, when combined with a circulated freight rate which is either exactly or approximately the freight rate from the point of shipment, plus an arbitrary percentage of profit, could be made the

basis of fixing prices or for an agreement for price maintenance which, if found to exist, would, under the decisions of this court, constitute a violation of the Sherman Act. But, as we have already said, the record is barren of evidence that the published list of costs and the freight rate book have been so used by the present association."

The Federal Trade Commission has entered one cease and desist order which dealt with standard cost accounting as in violation of the Anti-Trust laws. In Federal Trade Commission v. United Typothetae of America, 6 F. T. C. D. 345 (1923) the cost accounting system operated as a price fixing device, for the cost elements were arbitrary and were coupled with a recommendation of a fixed rate of profit of 25%. Because of the absence of judicial review this case is not a valuable precedent, though it does indicate the policy of the Federal Trade Commission as regards cost accounting plans which are used to accomplish illegal ends.

In conclusion it may be well to mention some of the significant features which will serve as a guide to a better understanding of the legal bounds of uniform cost accounting. The work of Benjamin S. Kirsh in his book on "Trade Associations" has been of valuable assistance and his conclusions as to the limitations and the significant features are as follows:

"1. The cost data must be as accurate as practicable. The figures must be based on actual and not on fictitious or arbitrary information. They must be fairly ascertained from the actual experience of the members reporting to the secretary, and must be accurately reproduced in the reports of the secretary to the membership. The data should not, therefore, be inflated or colored by the inclusion of items not actually present in the elements of cost of the reporting members.

"2. There must be no recommendation, advice, comment or criticism with respect to the amount of any item of cost, rate of profit or selling price to be set by the individual member. The decision of the Supreme Court in the Maple Flooring case apparently permits the discussion of cost data as well as comparative analysis by the individual member. But no agreement or attempt to agree on cost, or any specific item thereof, margin, sales price, or production policy, is permitted.

"3. The cost information must be essentially educational and informative in character. While the group in the industry may be educated in proper methods of cost accounting, it is of the utmost importance to bear in mind that the use of the cost-accounting data is a matter of individual choice. The member must exercise his own initiative, discretion and judgment in determing and fixing his own cost, margin and selling price. He must at all times be free to follow his own will in contrast to pressure from without by the association or any of its officers.

"4. The cost information should be published or made available to those who are not within the ranks of the association or to neutral publications, so that the appearance of secrecy and the possibility of distortion of the information for unlawful purposes by the members of the association may be, in a large measure, lessened.

"5. The cost data must be disseminated in such a manner that the information contributed by individual concerns is not identified by name and thus made known to competitors. Anonymous numbered reports by individual concerns which are not known to the membership of the association, can serve substantially the same purpose as identified reports. They perform substantially as well the service of disclosing the efficiency of business units in the industry. The general policy of the law, similar to the policy expressed in consideration of the general statistical activity of the trade association, is to forbid the identification of each report to detect those who did not conform to a proconceived, concerted arrangement to violate the anti-trust laws. It may be that identification of cost data is not so intimately related to the ultimate selling price. But to refrain from such identification is a safeguard which it would be wise to follow, as the law stands today.

"6. There should be no penal provision compelling group action as distinguished from free and uncontrolled individual discretion with respect to cost, margin or selling price. A member should not be subjected to the duress of fines or expulsion for exercising his individual judgment in these matters.

"7. Drastic supervision, which is employed to spy upon the activities of a member to discover whether or not he is conforming with the group plan, should be avoided.

"Uniform cost accounting methods will thus be judged with emphasis upon their demonstrated value rather than by the possibility that they have transgressed the technical rules of a forbidding law. Cooperative efforts on the part of trade associations seeking a more efficient, improved, and more serviceable technique will be judged by the law, when pursued within proper limits, with a view to enlarging the permissible area of operation. This seems a fair prophecy, now that the principle of uniform cost accounting has been accepted by the courts, as a sound legal, as well as economic, function."

APPENDIX

ADMINISTRATIVE DEVELOPMENT OF UNFAIR COMPETITION

From the foregoing discussion it is quite obvious that the legitimate and proper area of competition cannot be reduced to an abstract form. In the field of competitive practices the courts have had occasion to review only a small portion of unfair industrial behavior. Viewed in the historical perspective, the development of the law of unfair competition has been very unsatisfactory. Bearing in mind the legal principles deduced from the cases here discussed, it must be remembered that there is an abundance of precedent in the Federal Trade Commission in the form of cease and desist orders not reviewed by the courts, stipulations, and trade practice conferences, which serve as guides to our industrial conduct in the future.

Aside from those practices outlawed by cease and desist orders, the Federal Trade Commission has at least in theory made a valuable contribution by supplementing its statutory procedure through its trade practice conferences in which voluntary codes of ethics have been adopted to guide members of the industry in their future dealings. In fact the trade practice conference is a modern corollary to the early development of the law merchant. The progress made from this approach will be of valuable assistance in determining what the law will be in the future.

One of the outstanding improvements made in the time-worn procedure of the Commission is the process of disposing of an unfair competitive practice by stipulation of the parties, thereby eliminating the cumbersome administrative steps of the cease and desist order. Those stipulations although not tinted with judicial approval serve as a barometer of the Federal Trade Commission's attitude toward that particular practice.

In the succeeding outline an exhaustive survey has been made of those unfair competitive practices which the Federal Trade Commission has reviewed. Its attitude serves to temper the legal conception of unfair competition, and is undoubtedly valuable, entirely apart from the available judicial precedent.

UNFAIR METHODS OF COMPETITION AFFECTING THE INDIVIDUAL PURCHASER

I. Misrepresentation

1. As to weight or quantity

(a) Fictitious weights

Respondent engaged in the sale of sponges by weight "loaded" them by adding foreign substance, soaking them in solution of salts, thereby securing business on a false and fictitious basis. Cease and desist orders were issued in the following Complaints, Nos. 374, 375, 377, 379, 387, 389-394, 396-398.

(b) False packaging

The packing of butter in cartons of a definite size and shape, but with contents less than the standard weight, was condemned. Complaints Nos. 1041, 1042, 1043 and 1221.

Packing 14 ounces of butter in a standard one-pound size cartoon:

Federal Trade Commission v. Mountain Grove Creamery Co., 6 F.T.C. D. 426 (1923).

Federal Trade Commission v. Baltimore Paint & Color Works, 41 F. (2d) 474 affirmed order of Commission, in regard to false packaging in the sale of paints.

2. Composition, quality, condition or character of products

(a) Composition

(1) The Commission's order condemning the sale of goods chiefly made out of cotton as wool, was affirmed in Federal Trade Commission v. Winsted Hosiery Co., 258 U. S. 483 (1922).

(2) Sale of yellow pine as "California White Pine", Federal Trade Commission v. Algoma Lumber Co., 291 U. S. 67 (1934) (Order affirmed)

(3) Selling baking powder as "Cream Baking Powder" where cream of tartar, formerly used in its manufacture, has been replaced by a cheaper substitute:

Royal Baking Powder Co. v. Federal Trade Commission, 281 Fed. 744 (C.C.A. 2d, 1932) (order affirmed).

(4) Advertising a product composed of common salt with its impurities as containing sixteen different chemical and vegetable ingredients:

Guarantee Veterinary Co. v. Federal Trade Commission, 285 Fed. 853 (C.C.A. 2d, 1922) (Order affirmed).

(5) Representing "Ohio Improved Chester" hogs are a separate and distinct breed from a well known variety called "Chester White";

L. B. Silver Co. v. Federal Trade Commission, 289 Fed. 985 (C.C.A. 6th, 1923) (Order modified by vacating most essential paragraph of order).

(6) False advertising of product as "naptha" soap:

Proctor & Gamble v. Federal Trade Commission, 11 F. (2d) 47 (C.C.A. 6th, 1926) (Finding of unfair competition sustained). Cert. den., 273 U. S. 717 (1926).

(7) Misbranding paint by terming it "Combination White Lead".

Louis Leavitt v. Federal Trade Commission, 16 F. (2d) 1019 (C.C.A. 2d, 1926) (Per curiam) (Order affirmed).

(8) "Satinsilk" as a brand or label for cotton thread.

Sea Island Thread Co. v. Federal Trade Commission, 22 F. (2d) 1019 (C.C.A. 2d, 1927) (Affirmed without opinion).

(9) Selling wood as "Philippine Mahogany".

Indiana Quartered Oak Co. v. Federal Trade Commission 26 F. (2d) 340 (C.C.A. 2d, 1928) (Order affirmed). Cert. den., 278 U. S. 623 (1928).

(10) Branding imitation leather products as "Duraleather".

Masland Duraleather Co. v. Federal Trade Commission, 34 F. (2d) 733 (C.C.A. 3d, 1929) (Order modified in an immaterial particular).

(11) Selling and advertising as "Radium" a product possessing no radioactive qualities.

Federal Trade Commission v. Kay, 35 F. (2d) (C.C.A. 7th, 1929) (Order modified but substantially upheld). Cert. den., 281 U. S. 764 (1930).

(12) Using "Satinmaid" to describe a cotton fabric.

N. Fluegelman & Co., Inc. v. Federal Trade Commission, 37 F. (2d) 59 (C.C.A. 2d, 1930) (Order modified to allow use of term provided qualifying terms indicating cotton nature of material are added).

(13) Selling product not composed solely of genuine shellac gum dissolved in alcohol as "White Shellac".

Federal Trade Commission v. Cassoff, 38 F. (2d) 790, (C.C.A. 2d, 1930) (Order modified by permitting respondent to employ terms indicating the product was not wholly composed of shellac gum, without specifying percentages of other ingredients).

(14) Selling as "walnut" or "mahogany" furniture made of other woods with a thin veneer of walnut or mahogany.

Berkey & Gay Furniture Co. v. Federal Trade Commission, 42 F. (2d) 427 (C.C.A. 6th, 1930) (Order vacated on ground evidence showed better grade furniture was made of veneered rather than solid walnut or mahogany, and consequently no deception of retailers or of the public was present).

(15) Using term "Good Grape" in connection with an artificially colored and flavored preparation.

Federal Trade Commission v. Good-Grape Co., 45 F. (2d) 70 (C.C.A. 6th, 1930) (Order modified by permitting use of term on condition that artificial nature of preparation be indicated).

Cf. Federal Trade Commission v. Morrissey, 47 F. (2d) 101 (C.C.A. 7th, 1931) (Order prohibiting use of names of fruit in connection with drinks artificially colored and flavored; modified to permit use of fruit names

provided they be accompanied by a statement that they resemble the fruits in taste or color but contain no natural juice or coloring matter).

(b) As to quality.

(1) Label bearing pictorial representation showing mattresses with an uncovered and flaring to an exaggerated thickness.

Ostermoor & Co., Inc., v. Federal Trade Commission, 16 F. (2d) 962 (C.C.A. 2d, 1927) (Order vacated on ground representation was simply fanciful, not deceptive, and merely constituted the time-honored practice of "puffing" one's wares).

(2) Representation of "obesity cure" as "scientific"; failure to state that the preparation could not be taken safely except under medical advice.

Federal Trade Commission v. Raladam Co., 283 U. S. 643 (1931) (Order vacated, since jurisdiction of Commission is limited to unfair trade methods which affect competition, and there was no evidence that respondent's advertisements injured competitors).

(3) Label of snuff manufacturer containing words "dental snuff" and pictorial representation of a tooth.

Federal Trade Commission v. American Snuff Co., 38 F. (2d) 547 (C.C.A. 3d, 1930) (Order vacated, since purchasers were not misled by change from a former label, and since label merely indicates snuff is designed to be chewed rather than taken nasally).

(c) As to condition.

(1) Selling rebuilt tires as new.

Federal Trade Commission v. H. P. Jones, 1. F. T. C. D. 360 (1932).

(2) Marketing rebuilt typewriters as new

Federal Trade Commission v. Typewriter Emporium, 1 F. T. C. D. 105 (1915).

(3) Advertising a weak chemical preparation as "ten times stronger as a germicide than undiluted U.S.P. carbolic acid".

Federal Trade Commission v. Ginse Chemical Co., 4 F. T. C. D. 155 (1921).

(4) Re-issue of old files as new releases.

Fox Film Corp. v. Federal Trade Commission, 296 Fed. 353 (C.C.A. 2d, 1924) (Order affirmed)

(d) As to character.

(1) Continuing trade name without indicating change in the character of the product or ingredient.

Royal Baking Powder Company v. Federal Trade Commission, 281 F. 744 (C.C.A. 2d, 1922).

3. False Claim to Endorsement or use.

(a) Official endorsements and recommendations.

(1) False statement that product was adopted or purchased by the United States Government.

Guarantee Vetinary Co. v. Federal Trade Commission, 285 Fed. 853 (C.C.A. 2d, 1922).

(b) Endorsement by private individuals.

(1) Publishing testimonials of nationally known characters without disclosing that substantial payments are made.

Northam Warren Corp. v. Federal Trade Commission, 59 F. (2d) 196 (C.C.A. 2d, 1932) (Order vacated on ground payment for truthful testimonials deceives no one.)

4. As to Business status.

(a) Misrepresenting that respondent is a manufacturer.

(1) Trade or corporate name including word "Mills" where respondent does not own or operate a factory in which its products are made.

Federal Trade Commission v. Pure Silk Hosiery Mills, Inc., 3 F. (2d) 165 (C.C.A. 7th, 1925).

(2) Trade name including words "Milling company"; false representation that respondent was a manufacturer of flour sold direct from the mill.

Federal Trade Commission v. Royal Milling, 288 U. S. 212 (1933) (Order modified to permit use of name "Milling Company" providing that there was an explicit statement that respondent did not grind the grain).

(3) By pictorial representations.

Use of pictures of plants and factories on letterheads and advertising, to indicate respondents own them - ordered discontinued in Complaints Nos. 193, 491, 1104, 1107, 1720.

(b) Misrepresenting commercial rating (Stipulation No. 654).

(c) Advertising respondent has general distribution centers when in fact it is untrue (Stipulation No. 0137).

(d) Representation that respondent employed experts and that its business was world-wide in extent, when the facts were untrue. (Complaint No. 1850).

(e) Representing respondent was not engaged in a business for profit.

(1) Trade name "Anti-Tobacco League" implying non-profit organization, when in fact it was; --discontinued in Stipulation No. 0130.

5. As to Origin of Product.

(a) Labeling product made in the United States as "English Tub Soap".

Federal Trade Commission v. Bradley, 31 F. (2d) 569, (C.C.A. 2d, 1929) (Order affirmed).

6. As to Price Reductions.

(a) False representation that usual sale price for product was $20, in sale of two for $10.

Chicago Portrait Co. v. Federal Trade Commission, 4 F. (2d) 259 (C.C.A. 7th 1925). Cert. den., 269 U. S. 556 (1925) (Order vacated, on ground there was no evidence that customers were deceived or competition injured).

Cf. John C. Winston Co. v. Federal Trade Commission, 3 F. (2d) 961 (C.C.A. 3d, 1925) (Order affirmed) Cert. den. 269 U. S. 555 (1925).

(b) False representation that "loose leaf extension service" for encyclopedia was given free with purchase of books.

Consolidated Book Publishers, Inc. v. Federal Trade Commission, 53 F. (2d) 942 (C.C.A. 7th, 1931) (Order affirmed).

(c) By means of combination sales.

Selling groceries at a fixed aggregate price, placing the price of the staple articles below retail price and charging excessive prices for the other articles. Ordered discontinued in Complaints Nos. 349, 352.

(d) Misrepresenting that there was "no extra charge for credit" whereas substantial discounts were given on goods sold for cash. (Complaints Nos. 765 and 766).

(e) Misrepresenting that repairs were free, when in fact the charge was made up by excessive postage and package charges.

(f) Falsely advertising that the sale was below cost (Complaint No. 121).

(g) Representing that the price of the product would be advanced (Stipulations Nos. 521, 483).

(h) Representing that products are offered at "speical" or "introductory" prices. (Complaint No. 2010, Stipulations 733, 591, 483, 740, 607).

(i) Fictitious prices.

Marking enhanced prices on fountain pens, to mislead the purchaser as to the value of the product. (Complaints Nos. 561, 663-68, 670-673.)

Similarly as to razor hones, No. 806, as to pocket knives, 811, as to soaps, 848, as to sheet music, 1174, as to pianos, No. 577.

7. As to Medicinal or Curative Value of the Product.

(a) By means of advertising.

(1) That an electrical device was beneficial for certain ailments and had the endorsement of physicians, when those facts were not true. (Complaints 1695, 1703, 1679)

(2) That soap was medicated for skin treatment (Complaints Nos. 896, 1289).

(3) Antiseptic as cure for disease (Complaint No. 1845).

(b) By means of false brands.

(1) Labelling soap as containing olive oil, peroxide, palm oil, witch-hazel, medicines or drugs (Complaint No. 872).

8. Misrepresentations in the Sale of Corporate Securities.

(a) Misleading and deceptive statements in advertising, letters, maps, concerning the value of oil leases, properties, assets, and productivity. Ordered discontinued in Complaints Nos. 795, 596, 856, 857.

(b) Misleading reports on drilling operations when no work had begun. Complaints Nos. 595 and 785.

(c) Withholding material information as to thhe value of securities. Ordered discontinued in Complaints Nos. 861, 865, 871.

(d) Misleading statements that corporation owned large refineries, when in fact it did not. (Complaint dismissed for failure of proof).

(e) Simulating the name of the Royal Dutch Company to mislead purchasers to believe that respondent was affiliated with it. (See Complaint No. 999).

(f) Misleading announcements and reports in regard to nature and volume of business done. (Ordered discontinued in Complaint No. 273).

9. As to Contracts and Offers Made.

(a) False representations that sale was on "consignment" basis. (Complaint No. 1206).

(b) Persuading prospective purchaser to sign what was represented to be a "memorandum" when in fact it was a contract to purchase, or a promissory note.

(c) Misrepresentations in puzzle contests, - Stipulation No. 031, 030, 022.

(d) Advertising a free-trial offer when in fact the prospective purchaser is "required to make a deposit or payment prior to trial." (See Complaints No. 1965 and 2010.)

(e) Misrepresentation that article will be replaced. (Complaint No. 1986).

10. Misrepresentations made by Correspondence Schools.

(a) Misleading pupils by representing that school would place them; -- ordered discontinued in No. 1230 (mechanical drafting course).

(b) Exaggerated results of the course offered. (Complaints Nos. 1504, 1486).

(c) Misrepresenting that former pupils are successful; -- Stipulation No. 485.

(d) Misrepresentations as to the qualifications of the faculty, and false letters relating to the standing of the school. (See Complaint No. 1539).

(e) Use of "U. S. A." as part of name to deceive students to believe that respondent was affiliated with a government department. (Complaint No. 1834).

II. Lotteries.

1. The common law and criminal statutes have long considered lotteries contrary to public policy, but no case appears in which a lottery was enjoined as the suit of a competitor. It is obvious, of course, that such a practice would not constitute an injury to any specific competitor.

The Supreme Court has sustained the power of the Federal Trade Commission to order the discontinuance of a lottery as an unfair practice.

(a) Practice of determining price of candy by lot.

Federal Trade Commission v. R. F. Kennel & Brother, Inc., 291 U. S. 304 (1934).

(b) Lottery Clubs.

Misrepresenting the method of selecting the winner. (Complaint No. 1059.

(c) Use of a "punchboard" as a lottery scheme for selling merchandise, (Questioned in Complaints Nos. 1852, 1955, 1857, 1858).

III. Harassing Tactics.

1. Coercing dealers to comply with unenforceable contracts.

By representing accounts had been placed in hands of a collection agency, though in fact they had not been. Order discontinued in No. 1206.

2. Excessive charges over and above the customary cost-billing of such products, with threat of refusal to deal on failure to pay. (Stipulation 696).

IV. Basing Point Systems.

There is very little authority concerning the legality of Basing Point systems; however, certain types have approved in the following cases:

Maple Flooring Manufacturers Association v. United States, 268 U. S. 563 (1925).

Cement Manufacturers Protective Association v. United States, 268 U. S. 588 (1925).

United States v. Bolt, Nut & Rivet Manufacturers Assn., D. C. N. Y. 1931. Consent decree. Note in Harv. L. R. January 1932, page 548.

V. Predatory or local destructive Price Cutting.

1. Formation of "fighting" company to bid up prices of raw materials in order to drive out competitor.

Federal Trade Commission v. United Rendering Co., 3 F. T. C. D. 284 (1921).

Cf. Federal Trade Commission v. American Agricultural Chemical Co., 1 F.T.C.D. 226 (1918).

2. Locally cutting prices below those of competitors.

Federal Trade Commission v. Fleischmann Co., 1 F.T.C.D. 119 (1918) (Consent).

UNFAIR METHODS OF COMPETITION WHICH DIRECTLY AFFECT INDIVIDUAL COMPETITORS

.1. False claim of affiliation with competitor.

The respondent in the sale of slides made representations which implied that he was associated with his competitor. The practice was

discontinued in Stipulation No. 462. Representations of a like character in connection with the sale of silverware were ordered discontinued in Stipulation No. 801.

2. Appropriating results of competitor's efforts.

An order to cease and desist was issued in Complaint No. 898 in which the competitor duplicated the composition of the product for the purpose of obtaining a patent.

3. Purchasing competitor's stock from dealers or exchanging own goods.

Complaints No. 947 (snap fasteners) and No. 1025 (tacking machines and staples).

4. Acquiring competitor's trade secrets.

By payment of money to competitor's employees.
By means of employing spies, etc., ordered discontinued in Complaint No. 11 (lumber business) and Complaint No. 923 (in the sale of garment pressing machines).
Appropriation of competitor's customer list and other confidential information, which information was unlawfully extracted by former employees. Ordered discontinued in Complaint No. 223 (sale of fire extinguishers).

5. Secret control of fictitious competitor.

Complaint No. 6 (yeast business) and complaint No. 307 (lightening rod, etc.); respondents were ordered to discontinue the practice of concealing the control of a fictitious independent for the purpose of misleading the public into believing that the two companies were competing.

6. Publicity of anonymous attacks upon competitors.

In Complaint No. 868, the respondents were ordered to discontinue the practice of publishing anonymous, disparaging and derogatory opinions as to the wholesomeness of competitors' products (self-rising flour).

(See also complaint No. 1499 as to baking powder).

7. Disparagement of and misrepresentations concerning competitors.

(a) Common Law.

(1) False statements concerning a competitor's character or his professional ability, furnished a basis for a common law action for defamation.

Mattice v. Wilcox, 147 N. Y. 624 (1895).

Davey v. Davey, 50 N. Y. Supp. 161 (1896).

(2) A deliberate disparagement of a competitor's product which implied fraud or dishonesty was considered in the same category as defamation of character.

Stektee v. Kemin, 48 Mich. 322 (1822).
Mowry v. Reabe et al., 89 Cal. 606 (1891).
Stevens Ice Cream Co. v. Polar Products Co., 194 N. Y. Supp. 44 (1921).

(3) An attack upon a business concern's credit was held actionable.

Ryan v. Brewing Co., 15 N. Y. Supp. 661 (1891).
Brown v. Holton, 109 Ga. 431 (1899).
Cf. Stannoul v. Wilcox, 118 Md. 151 (1912) which limits this protection to traders.

(b) Federal Trade Commission.

(1) Court decisions affirming Commission's orders:

a) False and misleading statements concerning financial standing:

Chamber of Commerce v. Federal Trade Commission, 13 F. (2d) 673 (C.C.A. 8th, 1926).

b) Representation that the respondent's competitors did not deal fairly and squarely with their customers in the sale of sugar.

Sears Roebuck v. Federal Trade Commission, 258 Fed. 307, 309 (C.C.A. 7th 1919).

c) Statements which are true, will not be enjoined by the Federal Trade Commission as there is a lack of public interest which goes to the jurisdiction of the Commission.

John Bene & Sons, Inc. v. Federal Trade Commission, 299 Fed. 468 (C.C.A. 2d, 1924).

d) The Federal Trade Commission has not added to the common law remedies available in cases of defamation.

John Bene & Sons, Inc. v. Federal Trade Commission, supra.

(2) Federal Trade Commission orders on which there are no court decisions.

a) False and disparaging statements concerning the business methods of competitors.

Federal Trade Commission v. St. Louis Lighting Rod Co., 5. F.T.C.D. 327 (1921).

b) Statement that the competitor was a "pirate" of his product:

Federal Trade Commission v. Keaton Tire & Rubber Co., 5 F.T.C.D. 335 (1922).

8. Commercial Bribery and Secret Commissions to Dealers.

(a) Common Law Sanctions.

Although commercial bribery was not an unfair method of competition at common law, there were nevertheless certain well defined rules and principles which indirectly attacked this type of practice.

If the agent accepted a secret commission from a third person, in order to influence his principal's course of conduct or to award a contract, the principal could repudiate an executory contract.

Smith v. Lorby, 3 Q.B.D. 552 (1878);

City of Findlay v. Pentz, 66 Fed. 427 (C.C.A. 6th, 1895).

If the performance has been rendered and the price paid, the principal could recover from the donor the amount of the commission that had been given to the agent (Salford v. Dover, 1 Q.B.D. 168 (1891), and could compel the agent to account for the gratuity that he had received. So, too the breach of duty would entitle the principal to discharge the agent (Tinsley v. Penniman, 34 S. W. 365 (Texas, 1896)).

(b) Statutory Sanctions.

The common law remedies were clearly inadequate and seventeen states have passed statutes outlawing commercial bribery schemes, in some form or another.

Conn. Rev. Stat. (1918) sec. 6444;
Iowa Comp. Code (1919) c. 618, sec. 13317;
La Marr's Ann. Rev. Stat. (Sup. 1926) 391;
Md. Ann. Code (Bagby, 1924) Art. 27, p. 260;
Mich. Comp. Laws (1929) secs. 17094-99;
Mass. Gen. Laws (1921) c. 271, sec. 39;
Miss. Ann. Code (Hemingway 1927) c. 16, secs. 821, 822;
Neb. Comp. Stat. (1922) c. 6, Art. 2, sec. 9710;
N. J. Comp. Stat. (1910) p. 1810;
Nev. Rev. Laws Ann. (1912) c. 26. sec. 6796;
N. Y. Cons. Laws, c. 40, Art. 40, Sec. 439;
N. C. Cons. Stat. (1910) Art. 41, sec. 4475;
R. I. Gen. Laws (1923) c. 401, secs. 21,22;
S. C. Code (1932) sec. 1236;
Va. Code Ann. (1924) c. 185, sec. 4712;
Wash. Comp. Stat. (Remingtom) 1922, c. 10 secs. 2678-9;
Wis. Stat. (1923) c. 346, sec. 4575.

(c) Efforts of the Federal Trade Commission.

(1) Giving liquor, cigars, meals, theatre tickets and entertainment to employees of customers to induce them to influence their employers to purchase from respondents.

New Jersey Asbestos Co. v. Federal Trade Commission, 264 Fed. 509 (C.C.A. 2d, 1920) (Order reversed, on ground method of entertainment was "an incident of business from time immemorial" and did not affect the public interest).

(2) Giving prizes to salesmen of distributors, with consent of distributors, for "pushing" sales of respondent's products.

Kinney-Rome Co. v. Federal Trade Commission, 275 Fed. 665 (C.C.A. 7th, 1921) (Order vacated on ground no unfair competition could be present when prizes were given with knowledge of employer of salesmen).

(3) Secret commission paid by ship chandler to ship's captain on all supplies purchased.

Winslow v. Federal Trade Commission, 277 Fed. 206 (C.C.A. 4th, 1921) (Order reversed, on ground of absence of interstate commerce). Cert. den., 258 U. S. 618 (1922).

(4) Subsequent to these adverse court decisions, the Commission has entered a large number of orders directed against commercial bribery, e.g.

Federal Trade Commission v. United Chemical Products Corp., 4 F.T.C.D. 220 (1922).

Federal Trade Commission v. Cook Paint & Varnish Co., Annual Report (1934) 64.

(5) In one case a Circuit Court of Appeals denied the Commission's petition for enforcement of an order, without prejudice to the right to enter a new order, on the ground that the order should have enjoined only the giving of secret gratuities, and not those given with the consent of the employer.

Federal Trade Commission v. Advance Paint Co., (C.C.A. 7th, 1926, no opinion) See modified order, 10 F.T.C.D. 279 (1926).

9. Hindering and embarrassing competitors in the Motion Picture Industry by showing films in anticipation of competitors' advertised production.

A cease and desist order was issued in Complaint No. 140 against the respondents who secured films which competitors had previously announced would be shown and exhibited them in advance of the dates announced and for a lower price of admission.

10. Destruction of competitors' catalogues.

The Chamber of Commerce, in attempting to prevent the sale of goods by a mail order house, cooperated with the local theatre in accepting catalogues in lieu of admission price and offering prizes for the same. This practice was condemned in complaint No. 841.

11. Shipping goods to competitors' customers without orders.

In Complaint No. 219 (petroleum products), respondents were ordered to cease and desist from the practice of shipping goods to the competitors' customers without orders and attempting to induce consignee to accept and purchase them by guaranteeing the resale and giving long term credit.

12. Threats of Litigation.

This practice may be classed as a form of disparagement, or as a particular variety of harassing tactics.

(a) Common Law.

In Emack v. Kane, 34 Fed. 46 (C.C.N.C. Ill., 1888) an injunction was granted to restrain threats of suit for patent infringement, made in bad faith against customers of complainant.

Accord:

Cerosa v. Apco Manufacturing Co., 299 Fed. 19 (C.C.A. 1st, 1924).

However, certain state courts have reached a contrary result.

Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804 (1892). See generally, Nims, Unfair Competition and Trade Marks (3d ed. 1929) 703-713.

(b) The Federal Trade Commission, in seeking to discourage this practice, has made no contribution to the law of unfair competition.

Herman Heuser v. Federal Trade Commission, 4 F. (2d) 632 (C.C.A. 7th, 1925) (Order vacated, on ground of absence of bad faith, especially because respondent had instituted two suits for patent infringement, although after the proceedings before the Commission had begun).

Accord:

Flynn & Enrich Co. v. Federal Trade Commission, 52 F. (2d) 836 (C.C.A. 4th, 1931) (Absence of bad faith; lack of public interest additional ground of reversal).

Finding of bad faith since no patent rights existed as a basis for infringement threats.

Federal Trade Commission v. Gartside Iron Rust Soap Co., 1 F.T.C.D. 310 (1919)

(1) Federal Trade Commission orders with no court decision.

(a) Unfair use of patent rights by means of consent decrees. The practice of obtaining consent decrees

to prevent the use of similar devices in order to obtain a patent monopoly, and threatening suit for alleged infringement by the use of collusive consent decrees was ordered discontinued in Complaints Nos. 126 and 224.

(b) Threats to sue competitors' customers for patent infringement on a patent obtained by fraudulent analysis, imitation of competitors' product. Order to cease and desist such practices under Docket #898.

13. Price Discrimination to influence trade.

The giving of rebates and discounts to selective customers with a purpose of embarrassing competitors has been questioned by the Federal Trade Commission in the following complaints: No. 33 (radiators), No. 548 (lubricating oils).

(Note: Discrimination in price to drive out competitors was also condemned under Section 2 of the Clayton Act).

14. Giving of "free goods" and selling below cost.

(a) Orders in which there are no court decisions.

Federal Trade Commission v. Fleischman Co., 1 F.T.C.D. 119 (1918) (Giving to bakers more yeast "than required for proper sample or demonstration purposes").

Accord:

Federal Trade Commission v. National Distilling Co., 1 F.T.C.D. 88 (1918)

(b) Orders in which there are court decisions.

(1) Giving free loaf of bread with each one purchased.
Ward Baking Co. v. Federal Trade Commission, 264 Fed. 330 (C.C.A. 2d, 1920) (Order reversed for lack of interstate commerce.)

Sears Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307 (C.C.A. 7th, 1919).

Held: The Federal Trade Commission has no power to prevent selling below cost or giving away goods where there are no representations which tend to injure or to discredit competitors and deceive purchasers as to the real character of the transaction.

(2) Bidding up prices of supplies to destroy competition.

Federal Trade Commission v. American Agricultural Chemical Co. and the Brown Co., 1 F.T.C.D. 226 (1918).

(c) Stipulations.

(1) In Stipulation No. 267 the practice of giving free dinner sets and premiums with the sale of respondent's products was ordered discontinued.

(2) The giving of free premiums with the purchase of office supplies was discontinued in Stipulation No. 279.

(3) The practice of using the words, "free" or "give", in the sale of certain products, where the cost is included in the purchase price of another article sold in connection therewith, has been ordered discontinued by the Commission in the following stipulations: No. 472, No. 485, No. 468; No. 446, No. 619.

15. Interference with Competitors' Source of Supply.

(a) By means of excessive purchase prices. This unfair method of competition has been generally practiced by large concerns in order to stifle small competitors who are unable to purchase at an enhanced price. (No. 79, Fertilizer Industry, and No. 159, Refining animal fats).

(b) Cooperative action by association through boycotts, threats of boycott, and threats of withdrawal of patronage.
Where an Association of Wholesalers and Jobbers combined to prevent certain competitors from obtaining supplies by these means, the Federal Trade Commission in Complaint #579 ordered the discontinuance of such practice (Wholesale Grocers Association).

(c) Individual effort to obstruct competitors' purchases.
Federal Trade Commission v. Raymond Brothers-Clark Co., 280 Fed. 529, affirmed 263 U. S. 565 (1924) (505.4153). In this case the Commission had ordered an individual who attempted to induce a manufacturer to refuse to sell to a competitor to discontinue the practice. The court reversed the Commission's order.

16. Physical interference with competitors' employees or property.

The respondent who instructed his drivers to collide with the trucks of his competitor in order to hinder and embarrass competitor in his business operations was ordered to desist in Stipulation No. 79 (fertilizer business).

17. Issuance of false complaints to the Federal Trade Commission concerning competitor's business operations.

In Complaint No. 898 the respondent was ordered to cease and desist from fabricating letters and forging signatures for the purpose of inducing action by the Federal Trade Commission against his competitor.

18. Appropriation of competitor's shipments.

Respondent was ordered to cease and desist from accepting the shipments intended for competitors in Complaint No. 276.(Scrap iron and steel).

19. Inducing breach of contract.

(a) Under the common law.

After Lumley v. Gye, 2 El. & Bl. 216, 118 Engl Rep. 749 (1853) some dispute arose among the courts as to whether inducement of breach of contract was in all circumstances a legal wrong. A few courts limited the doctrine of that case to the enticement of employees. See, e.g., Glencoe Sand and Gravel Co. v. Hudson Bros. Commission Co., 138 Mo. 439, 40 S.W. 93 (1897). One or two other courts refused to allow an action for inducing a breach of contract unless the defendant's action was accompanied by threats, violence or fraud. See Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492 (1893). However, the general tendency is to grant recovery for any intentional procurement of breach of contract, without requiring malevolence, fraud or coercion. Sayre, Inducing Breach of Contract (1922) 36 Harv L. Rev. 663 (1923).

Bitterman v. Louisville & Nashville R. Co., 207 U.S. 205 (1907).
Tabular Rivet & Stud Co. v. Exeter Boot & Shoe Co., 159 Fed. 824 (C.C.A. 1st, 1908).
R and W Hat Shop v. Scully, 98 Conn. 1, 118 Atl. 55 (1922).

The motive of trade competition on the part of the defendant is no justification for inducing the breach. Beekman v. Masters, 195 Mass. 203, 80 N.E. 817 (1907). In this respect, therefore, the Federal Trade Commission has merely contributed a new remedy for a practice already considered unfair at common law.

(b) Action taken by the Federal Trade Commission.

(1) Inducing breach of contract.

Federal Trade Commission v. Stanley Booking Corp., 1 F.T.C.D. 212 (1912).
Utah-Idaho Sugar Co. v. Federal Trade Commission, 22 F. (2d) 122 (C.C.A. 8th, 1927) (Order vacated, on ground raising of sugar beets and manufacture of sugar did not constitute interstate commerce).

(2) Enticing employees.

Federal Trade Commission v. Standard Car Equipment Co., 1 F.T.C.D. 144 (1918).

20. Espionage.

(a) At common Law.

In the rare instances in which the question has arisen, the courts at common law have refused to enjoin espionage in trade competition, where no violation of trust was involved.

Park & Sons Co. v. National Wholesale Druggists' Association, 175 N. Y. D. 67 N.E. 136 (1903)

Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co., 31 Utah 377, 88 Pac. 26 (1906).

(b) Under the Federal Trade Commission Act.

Philip Carey Mfg. Co. v. Federal Trade Commission. (C.C.A.6th)

29 F.(2d) 49 (1928) (Order vacated because there was no evidence that information acquired by employees of respondent who posed as customers of a competitor was unlawfully used to suppress competition).

(1) By means of spies.

Condemned in Federal Trade Commission v. Botsford Lumber Co., 1 F.T.C.D. 60 (1919)

a) To get competitor's customer list.

Trailing competitor's agent and employees to hinder them in the conduct of their business, to learn names and addresses of competitor's customers. (Complaints Nos. 6 (yeast), 11 (lumber), 307 (Lightning rods), 159 (refining animal fats)).

b) Securing information as to operations and other trade secrets.

Paying spies to enter competitor's plant or offices to secure such information. No. 215 (mineral separation processes), 223 (fire extinguishers), 344 (automobile fans).

c) Obtaining information concerning competitor's shipments and sources of supply from employees. No. 1145.

(2) Posing as customers to obtain data intended only for customers.

Sending of requests to mail order house to obtain specifications, estimates, prices, etc., information intended only for bonafide customers. Practice ordered discontinued in complaints Nos. 11, 195, 209.

(3) Securing estimates and bids for the purpose of underbidding competitor.

Building material. Practice questioned in Complaint 730, but dismissed without assignment of reasons.

21. Molestation, Harrassing Tactics, Interference with Competitors.

"The rule may now be considered as settled, that injury caused to another's business, or legitimate interests, even though not by means in themselves unlawful, is actionable, unless justified

by legitimate self-interest." Nims, Unfair Competition and Trade Marks (3d ed. 1929) 447; see, generally 436-449.
In American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U. S. 350 (1921) the Supreme Court enjoined the Federal Reserve Bank from attempting to force a state bank into the Federal Reserve System by accumulating checks on state banks until they reached a large amount and then presenting them for payment over the counter.
In Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.R. 371 (1911) the court recognized a right of action against the defendant who had entered the business of supplying oil at retail, not for the purpose of profiting from the retail trade, but for the sole purpose of driving plaintiff out of business because he refused to purchase exclusively from defendant. In Evenson v. Spaulding, 150 Fed. 517 (1907) an injunction was granted to restrain hardware and farm implement dealors from employing agents to follow the salesmen of plaintiff, to interfere with their efforts to make sales, and to dissuade prospective purchasers from buying, with the purpose of driving plaintiff out of the territory in question. Thus the business tactics which the Federal Trade Commission has declared unfair were already unfair at common law.

Various forms of molestation and harassing tactics to interfere with and destroy competitors:

Utah-Idaho Sugar Co. v. Federal Trade Commission, 22 F. (2d) 122 (C.C.A. 8th, 1927) (Order vacated on ground raising of sugar beets and manufacture of sugar do not constitute interstate commerce).
Cf. Philip Carey Mfg. Co. v. Federal Trade Commission, 29 F (2d) 49 (C.C.A. 6th, 1928).
Bribing employees of customers to adulterate and spoil products sold by competitors:

Federal Trade Commission v. Essex Varnish Co., 1 F.T.C.D. 138 (1918).
Fictitious requests for catalogues or estimates:
Federal Trade Commission v. Botsford Lumber Co., 1 F.T.C.D. 60 (1918).
Federal Trade Commission v. Chamber of Commerce of Missoula, 5 F.T.C.D. 451 (1923).

22. Trade marks and trade names -- "passing off".

(a) Common Law.

At common law it was unfair competition to appropriate the good-will of a competitor by simulating its trade mark, label, or trade name, or the color, design or shape of its products, in such fashion as to "pass off" one's goods for those of the competitor.

Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 580 (1908);
L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88 (1914);
McLean v. Fleming, 96 U.S. 245 (1877);
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916);

Cf. Pillsbury-Washburn Flour Mills Co. Ltd. v. Engle, 86 Fed. 608 (C.C.A. 7th 1898).

The common law also afforded relief where the parties were not in competition, but the name used by the defendant, in an allied trade, would lead purchasers to believe that the plaintiff had entered the line of business in which defendant was engaged.

Akron-Overland Tire Co. v. Willys-Overland Co., 273 Fed. 674 (C.C.A. 3d, 1921);
Peninsular Chemical Co. v. Levinson, 247 Fed. 658 (C.C.A. 6th, 1917);
Vogue Co. v. Thompson Hudson Co., 300 Fed. 509.(C.C.A. 6th 1924).
See generally, Nims, Unfair Competition and Trade Marks. (3d. ed. 1929).

(b) Federal Trade Commission.

In the trade mark and trade name cases, therefore, the remedy at common law was adequate; and in this field the Federal Trade Commission has developed no new concept of unfairness. Cases which reached the courts are:

Juvenile Shoe Co. v. Federal Trade Commission, 289 Fed. 57 (C.C.A. 9th 1923) (Order affirmed);
Federal Trade Commission v. Balme, 23 F. (2d) 615 (C.C.A. 2d 1928) (Order affirmed). Cert. den. 277 U. S. 598 (1928).
Lighthouse Rug Co. v. Federal Trade Commission, 35 F. (2d) 163 (C.C.A. 7th, 1929).

23. Price Fixing Activities.

(a) Agreements among competitors to maintain price levels.

(1) Labor boycotts used to maintain price structure.
An association of photographers agreed with a photographers' union to maintain a standard scale of uniform prices in exchange for the union's promise not to permit its members to work for manufacturers who did not maintain the scale of uniform prices. A cease and desist order was issued in Complaints Nos. 82 and 928.

(2) Concerted action to enhance and maintain prices by means of meetings and correspondence.
A cease and desist order was issued against an association of paper manufacturers in Complaint No. 17.

(3) By means of "standard cost finding system".
A national organization of printers in an effort to enhance, fix and maintain prices established a standard cost finding system. A complaint issued against the United Typothetae of America was dismissed on stipulation of the parties.

(4) Censoring trade directory list in an effort to maintain price level.

A cease and desist order was issued against the Salt Producers Assn. in Complaint No. 781. The respondents censored the trade directory list for the purpose of maintaining prices and they agreed to allow discounts only to those dealers listed.

(5) Method of fixed price list.

An order to cease and desist in Complaint No. 1010 was issued against members of a coal distributive association.

(6) Reporting plan.

Members of a cutlery association reporting their prices, sales, etc., with the object of enhancing prices and maintaining them discontinued such practices after Complaint No. 1246 was issued.

24. Bogus Independents.

Federal Trade Commission v. Armour & Co. & Farmers Cooperative Fertilizer Co., 1 F.T.C.D. 430 (1919).

The respondents owned the capital stock of a subsidiary corporation engaged in the same business and represented it to be an independent farmers' cooperative company. The concealed operation of the subsidiary company was held an unfair method of competition.

Federal Trade Commission v. Fleischmann Company, 1 F.T.C.D. 119 (1918).

It was held to be an unfair method of competition to conceal the control and affiliation with other yeast companies which held themselves out and advertised as independents.